
INTRASTATE PREEMPTION

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INTRODUCTION	1114
I. HOW CITIES BECAME POLICY INNOVATORS	1117
A. <i>The Old Regime of Dillon's Rule</i>	1122
B. <i>The Emergence of Home Rule</i>	1124
C. <i>Competing Normative Assessments of Home Rule</i>	1127
1. Justifications for Home Rule	1127
2. Criticisms of Home Rule	1132
II. IMPLIED PREEMPTION AS A TOOL OF INTEREST GROUPS.....	1133
A. <i>Frequent Opponents of Local Regulation</i>	1134
B. <i>Intrastate Implied Preemption Doctrine</i>	1140
1. "Prohibit/Permit" and "More Stringent"	1142
2. "Occupation of the Field"	1153
III. A NEW APPROACH TO IMPLIED PREEMPTION: PRESERVING STATE SUPREMACY WHILE PROTECTING GOOD-FAITH LOCAL POLICY INNOVATION	1157
A. <i>The Judiciary's Institutional Advantages in the Context of Preemption</i>	1159
1. Geographic Impartiality.....	1160
2. Tempered Political Insulation.....	1164
3. Speed	1166
B. <i>Substantial Interference with State Law</i>	1168
CONCLUSION.....	1175

City policy experimentation is a catalyst for change at the state and national levels. From gay rights to the environment to public health, cities and other forms of local government are adopting new and innovative policies in the wake of inaction by the higher levels of government. The legality of these policies is frequently challenged, however, by claims that a city's ordinance has been preempted by state law. Despite the crucial importance of intrastate preemption to the question of city power, it has heretofore received scant academic attention. This paper demonstrates how, as currently applied, intrastate preemption dampens local policy innovation, which has a negative

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effect on the state and national political processes. It argues that state courts, drawing on their institutional advantages, should take a new approach to intrastate preemption that facilitates good-faith policy experimentation by cities, while discouraging parochial and exclusionary municipal action.

INTRODUCTION

Justice Brandeis famously described the states as “laboratories” of democracy, and that memorable phrase has since been invoked repeatedly to extol public policy innovation as one of the primary virtues of our federalist system.¹ Much less praise has been showered upon another set of important policy “laboratories”: cities, counties, and other forms of local government. Now secure in their exercise of “home rule” authority – that is, the delegated power from state to city² to engage in substantive policymaking – and often frustrated with perceived legislative stagnancy at the federal and state level, cities have enacted new and innovative policies in a wide variety of fields. In the sheer number of laboratories offered, local governments dwarf the mere 50 states: there are 15,000 municipalities and 3,000 counties,³ as well as 35,000 special-purpose districts.⁴

One particular legal doctrine, however, often frustrates cities’ ability to innovate: preemption. City ordinances, like state laws, are subject to federal preemption, but the primary threat to local innovation is the charge of *intrastate* preemption: that a city’s authority in a particular area has been supplanted by state law. Business and industry groups are the litigants who most commonly assert preemption to block local policies that may impose additional costs and regulatory burdens. For instance, when cities banned smoking in bars and restaurants, restaurateurs, bar owners, and tobacco interests sued, alleging that the cities’ ordinances were preempted by the more smoking-friendly state laws that preceded the ordinances.⁵ Likewise, when cities passed gay rights legislation – such as ordinances establishing sexual orientation as a protected class for the purposes of job discrimination (when state law did not so provide) – businesses sued, again alleging that the cities’

¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

² Borrowing somewhat from Professor Gerald Frug, I shall, as a matter of convenience, frequently use the word “city” throughout this paper as an under-inclusive reference to *any* form of local government. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1061-62 (1980).

³ Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 259 (2004).

⁴ So-called “special-purpose districts” vary widely in their scopes and authority; some have substantive policymaking authority whereas others have narrower missions. RICHARD BRIFFAULT & LAURIE REYNOLDS, *STATE AND LOCAL GOVERNMENT LAW* 11 (6th ed. 2004). There are also approximately 13,500 school districts, which is the most common form of special-purpose district in the United States. *Id.*

⁵ See *infra* note 135 and accompanying text.

ordinances had been preempted by state law.⁶ The examples are legion, but the story is familiar: when a city adopts a new policy that differs from state law and may harm some segment of the business community, a preemption challenge is almost certain to follow.⁷

When a state legislature explicitly declares that local laws are preempted within a certain field – so-called “express preemption” – the courts’ task is relatively simple: to determine whether the challenged ordinance falls within the subject matter that the legislature expressly preempted.⁸ But when the state

⁶ See *infra* note 140 and accompanying text.

⁷ See *infra* notes 135-47 and accompanying text.

⁸ See Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2100 (2000). Of course, even when the legislature expressly preempts an area, courts must still determine the scope of this express declaration of preemption, a task which involves all of the usual difficulties of statutory interpretation. See Lars Noah, *Reconceptualizing Federal Preemption of Tort Claims as the Government Standards Defense*, 37 WM. & MARY L. REV. 903, 925-26 (1996); Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 37-51 (1995). Determining the contours of the expressly preempted “field” often generates significant disagreement within state courts. See, e.g., *Town of Telluride v. Lot Thirty-Four Venture L.L.C.*, 3 P.3d 30, 32 (Colo. 2000) (disagreeing as to whether a state’s express prohibition on localities adopting rent control ordinances preempts a town’s affordable housing requirement for developers; majority said yes); *Fondessy Enters. v. City of Oregon*, 492 N.E.2d 797, 799 (Ohio 1986) (disagreeing as to reach of express preemption provision concerning hazardous waste facilities); *Dallas Merchant’s & Concessionaire’s Ass’n v. City of Dallas*, 852 S.W.2d 489, 490 (Tex. 1993) (disagreeing as to whether state law’s express preemption of the field of alcohol regulation subsumed a Dallas “zoning” ordinance aimed at problems associated with liquor stores; majority said yes).

Further, it is not always clear if and when a provision of state law amounts to an express preemption provision. See, e.g., *City of Seattle v. Williams*, 908 P.2d 359, 366 (Wash. 1995) (majority and dissent disagreeing as to whether provision of state law requiring traffic laws to be “uniform” amounted to an express preemption provision invalidating a local driving-under-the-influence ordinance that was stricter than state law); see also Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 263 (2000) (“[T]he distinction between ‘express’ and ‘implied’ preemption is surprisingly elusive.”). A well-known federal example of the considerable disagreement that express preemption cases can generate is *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), in which the Court split over the reach of a federal express preemption provision.

Despite the considerable difficulties express preemption cases may engender, courts in such cases possess the obvious advantage of being presented with some explicit articulation of the legislature’s intention regarding preemption, whereas implied preemption occurs when there is legislative *silence* on the matter. Cf. Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENT. 395, 396 n.8 (“Interpreting what [the legislature] means when it has spoken is often difficult enough; to determine what [the legislature] means when it has said nothing at all is impossible.”). But see Stabile, *supra*, at 91 (arguing that express preemption does “more mischief than good” and that preemption should be the exclusive province of the courts).

legislature has given no clear guidance regarding preemption, state courts⁹ ask whether local authority has nonetheless been impliedly preempted. Unfortunately, in performing this inquiry, courts too often rely on unhelpful judicial tests, like asking whether the local ordinance “prohibits that which state law permits”¹⁰ or invades a field fully “occupied” by state law.¹¹ State courts have applied these tests inconsistently, sometimes upholding local authority and sometimes constricting it,¹² creating a confusion that invites preemption challenges that might never be brought if the law were clearer. For this reason, local government scholars have described intrastate preemption – particularly, the implied variety – as a “problematic shadow”¹³ over city power and a “dilemma for local governments” that imposes “severe constraints on local policy innovation and choice.”¹⁴ Despite these complaints, however, and despite the importance of the issue, local government scholars have paid relatively little attention to intrastate preemption, generally addressing it only briefly in the context of a larger discussion of the vertical distribution of state power.¹⁵

⁹ In rare cases federal courts decide intrastate preemption matters when they are asserted in actions based on diversity or separate federal questions. *See, e.g.*, *S.D. Myers, Inc. v. City & County of San Francisco*, 336 F.3d 1174 (9th Cir. 2003); *E.B. Elliott Adver. Co. v. Metro. Dade County*, 425 F.2d 1141, 1149-51 (5th Cir. 1970). In such instances, of course, a federal court purports to apply state law to the issue of intrastate preemption. *Id.* at 1151.

¹⁰ *See infra* note 132 and accompanying text.

¹¹ *See infra* notes 198-99 and accompanying text.

¹² *See, e.g.*, *Rubey v. City of Fairbanks*, 456 P.2d 470, 475 (Alaska 1969) (claiming that the subject of preemption is “complex”); *Mangold Midwest Co. v. Vill. of Richfield*, 143 N.W.2d 813, 815-16 (Minn. 1966) (stating that the law of preemption is “not too clear”); James E. Allen, Jr. & Laurence K. Sawyer, *The California City versus Preemption by Implication*, 17 HASTINGS L.J. 603, 603 (1966); Michael H. Feiler, *Conflict Between State and Local Enactments – The Doctrine of Implied Preemption*, 2 URB. LAW. 398, 399 (1970) (highlighting the “confusion” associated with preemption cases).

¹³ David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2366 (2005).

¹⁴ Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 639-40 (2001); *see also* Briffault, *supra* note 3, at 264; Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 270 (2000) (asserting that “[s]tate courts frequently invoke implied preemption to invalidate local environmental laws”).

¹⁵ *See, e.g.*, Barron, *supra* note 13, at 2365-66; Briffault, *supra* note 3, at 264-65; Rodriguez, *supra* note 14, at 639-40; Weiland, *supra* note 14, at 270. *See generally* George D. Vaubel, *Toward Principles of State Restraint upon the Exercise of Municipal Power in Home Rule*, 22 STETSON L. REV. 643 (1993). Two older scholarly pieces have explored in depth the issue of intrastate preemption as it applies throughout the nation. *See* Feiler, *supra* note 12; Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737 (1959). A handful of other pieces have focused on the doctrine’s application within a specific state. *See generally* Allen & Sawyer, *supra* note 12; Robert W. Bower, Jr., *Home Rule and the Pre-emption Doctrine: The Relationship Between State and Local Government in Maine*, 37 ME. L. REV. 313 (1985); Gerald L. Sharp, *Home Rule in Alaska: A*

This Article seeks to highlight the importance of intrastate preemption to local government law, and offer a new approach to the doctrine. Part I of the Article provides some historical background on the role of cities as policy incubators and explains how the home rule movement granted substantive policymaking authority to cities. Part I argues that policy experimentation is the most compelling normative justification for home rule, but acknowledges that home rule has also enabled cities to act parochially. Part II criticizes the current doctrine of intrastate preemption, demonstrating how it is often used to curtail local authority and provides unclear guidance to both cities and the state legislatures regarding the extent of local authority. Finally, Part III defends a modest judicial role in deciding questions of preemption, outlining an approach that maximizes what I call “good-faith” policy experimentation while minimizing the tendency of cities to pursue parochial and exclusionary policies.

I. HOW CITIES BECAME POLICY INNOVATORS

Cities have increasingly led in enacting new policies in a wide variety of areas, including living-wage laws,¹⁶ workers’ rights,¹⁷ global warming reduction,¹⁸ public financing of campaigns,¹⁹ trans fats regulation,²⁰ affordable

Clash Between the Constitution and the Court, 3 UCLA-ALASKA L. REV. 1 (1973); Thomas P. Solheim, *Conflicts Between State Statute and Local Ordinance in Wisconsin*, 1975 WIS. L. REV. 840; J. Scott Smith, Comment, *State and Local Legislative Powers: An Analysis of the Conflict and Preemption Doctrines in Maryland*, 8 U. BALT. L. REV. 300 (1978).

¹⁶ See, e.g., Cicero A. Estrella & Anastasia Hendrix, *Minimum Wage Jump Welcomed*, SAN FRAN. CHRON., Nov. 6, 2003, at A18; Steve Friess, *Santa Fe’s Higher Wage Rate Cuts Both Ways*, USA TODAY, May 5, 2006, at 3A.

¹⁷ See, e.g., Ilana DeBare, *S.F. Businesses Scramble over Sick Leave Law*, SAN FRAN. CHRON., Jan. 12, 2007, at A1 (explaining San Francisco’s ordinance requiring paid sick leave).

¹⁸ See, e.g., Anthony Faiola & Robin Shulman, *Cities Take Lead on Environment as Debate Drags at Federal Level*, WASH. POST, June 9, 2007, at A1 (stating that 522 mayors pledged to meet Kyoto standard).

¹⁹ See, e.g., Richard Briffault, *The Return of Spending Limits: Campaign Finance After Landell v. Sorrell*, 32 FORDHAM URB. L.J. 399, 404-10 (2005) (discussing Cincinnati’s and Albuquerque’s spending limits); PORTLAND, OR., CITY CODE & CHARTER ch. 2.10, § 110 (2007), available at <http://www.portlandonline.com/auditor/index.cfm?a=161740&c=38523> (promulgating campaign spending limits for certified candidates).

²⁰ See, e.g., Thomas J. Lueck & Kim Severson, *New York Bans Most Trans Fats in Restaurants*, N.Y. TIMES, Dec. 6, 2006, at A1 (discussing New York City Board of Health’s decision to ban trans fats in restaurant cooking, which will take effect July 1, 2008); Janice O’Leary, *City Declares War on a New Public Enemy - Trans Fat*, BOSTON GLOBE, Dec. 3, 2006 (discussing Cambridge, Massachusetts’s plan to reduce the amount of trans fats in food preparation).

housing,²¹ universal health care,²² environmental protection,²³ gay rights,²⁴ and smoking prevention.²⁵ In many of these areas, one or two innovative cities

²¹ Many cities have rent “control” or “stabilization” ordinances, *see, e.g.*, LOS ANGELES RENT STABILIZATION ORDINANCE, LOS ANGELES MUNICIPAL CODE ch. XV, art. 1 (2007), available at http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:lanc_ca, and ordinances regulating condominium conversion, *see* Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 537 (1984). Some cities have attempted to mandate that developers devote a certain fraction of the housing they build to affordable residences. *See generally* Telluride v. Lot Thirty-Four Venture L.L.C., 3 P.3d 30 (Colo. 2000) (discussing ordinance requiring developers to include price-capped affordable rental units in developments).

²² *See, e.g.*, Victoria Colliver, *Can S.F.'s Health Plan Deliver?*, SAN FRAN. CHRON., Dec. 3, 2006, at F1.

²³ *See, e.g.*, Jesse McKinley, *San Francisco Board Votes To Ban Some Plastic Bags*, N.Y. TIMES, Mar. 28, 2007, at A16 (describing San Francisco ordinance to ban non-biodegradable plastic bags from large supermarkets); Katie Zezima, *Boston Plans To Go 'Green' on Large Building Projects*, N.Y. TIMES, Dec. 20, 2006, at A18 (describing Boston's adoption of a “green” building code for large-scale construction projects); Phuong Cat Le, *Man Gets First Orca Safety Ticket*, SEATTLE POST-INTELL., Oct. 7, 2007 (discussing the San Juan County, Washington, ordinance designed to protect orcas from speedboaters); *see also* Ian Urbina, *Pressure Builds To Ban Plastic Bags in Stores*, N.Y. TIMES, July 24, 2007, at A19 (claiming that a number of other cities around the country are considering plastic bag bans after San Francisco's action).

²⁴ A large number of cities and counties around the country, as well as a growing number of states, provide health and other benefits to the partners of same-sex employees. *See* HUMAN RIGHTS CAMPAIGN, THE STATE OF THE WORKPLACE 11 (2005-06), available at http://www.hrc.org/documents/SOTW_2005-2006.pdf (identifying 13 states and 201 cities, counties, and other governmental organizations that provided benefits to same-sex partners as of 2006). In other instances, cities have passed laws outlawing discrimination on the basis of sexual orientation when state law does not so provide. *See, e.g.*, Brendan O'Shaughnessy & Mary Beth Schneider, *Foes Claim Votes Were Traded in Both Measures*, INDIANAPOLIS STAR, Dec. 20, 2005, at 1A. The most high-profile gay rights cause advanced by cities in the last few years, of course, was gay marriage; all of the local efforts in this area, however, were eventually invalidated. *See* Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 148-49 (2005).

²⁵ Numerous cities have banned smoking in bars and restaurants. *See* Smoke Free USA, <http://www.smokefreeworld.com/usa.shtml> (last visited Oct. 6, 2007); *infra* note 135. In addition, cities have also restricted the availability of cigarette vending machines, *see infra* text accompanying notes 200-204, and have limited the areas where billboards advertising tobacco products can be displayed, *see* Penn. Adver. of City of Baltimore v. Mayor and City Council of Baltimore, 862 F. Supp. 1402 (D. Md. 1994). A couple of cities – Bangor, Me., and Keyport, N.J. – have banned smoking in cars with children. Pam Belluck, *Maine City Bans Smoking in Cars with Children*, N.Y. TIMES, Jan. 19, 2007, at A1; Ronald Smothers, *New Jersey Senate Panel Supports Penalty for Smoking in Cars with Children*, N.Y. TIMES, June 8, 2007, at B4 (reporting further that Arkansas and Louisiana have statewide bans and the New Jersey state legislature is considering one). In October 2007, California enacted a

have spurred other cities and some states to take action. For instance, while about twenty states have now adopted near-complete bans on smoking in bars and restaurants, most did so only after cities first successfully implemented such bans and the effect on local businesses proved negligible.²⁶ Similarly, in the realm of gay rights, it was a city – San Francisco – that first required municipal contractors to offer domestic partnership benefits to gay employees.²⁷ Only after this policy had been established for seven years – and four other California localities adopted similar measures – did the California state legislature pass a similar law governing state contractors.²⁸ These examples illustrate a widespread pattern of policy innovation: a policy first embraced by a city proves itself manageable and popular at the local level before percolating “out” to other cities and “up” to the state level. Without the possibility of city experimentation, these policies might have never been embraced by other jurisdictions.

statewide ban on the practice. James P. Sweeney, *Drivers Barred from Smoking If Children Are in Car*, S.D. UNION-TRIB., Oct. 11, 2007, at A3.

²⁶ Andrea Elliott, *Bars and Restaurants Thrive Amid Smoking Ban, Study Says*, N.Y. TIMES, Mar. 29, 2004, at B2.

²⁷ See SAN FRANCISCO CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.1 (effective June 1, 1997), available at http://www.sfgov.org/site/sfhumanrights_page.asp?id=5922#sec12b.1; SAN FRANCISCO HUMAN RIGHTS COMMISSION, THE EQUAL BENEFITS ORDINANCE: A SIX-MONTH REPORT (1998).

²⁸ CAL. PUB. CONT. CODE § 10295.3 (West 2004). The four other California localities to pass ordinances similar to San Francisco’s were Berkeley, Los Angeles, Oakland, and San Mateo County. BERKELEY, CAL., MUNICIPAL CODE § 13.29.030 (2007), available at <http://www.cityofberkeley.info/bmc/BMC-Part1-Aug07.pdf>; L.A., CAL., ADMINISTRATIVE CODE § 10.8.2.1 (2007), available at <http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:laacca>; OAKLAND, CAL., MUNICIPAL CODE ch. 2.32, available at <http://bpc.iserver.net/codes/oakland/>; SAN MATEO, CAL., COUNTY CODE ch. 2.84 (2007), available at <http://municipalcodes.lexisnexis.com/codes/sanmateo/index.htm>. Sacramento has since passed a similar ordinance. Other localities around the country that have passed similar ordinances include King County, Wash.; Miami Beach, Fla.; Minneapolis, Minn.; Olympia, Wash.; Seattle, Wash.; and Tumwater, Wash. See MIAMI BEACH, FL., CODE ch. 2, art. VI, div. 3, § 2-373 (1998), available at <http://www.municode.com/resources/gateway.asp?pid=13097&sid=9>; MINNEAPOLIS, MINN., CODE OF ORDINANCES § 18.200 (effective Jan. 1, 2004), available at <http://www.municode.com/resources/gateway.asp?pid=11490>; SEATTLE, WASH., MUNICIPAL CODE ch. 20.45.020 (1999), available at <http://clerk.ci.seattle.wa.us/~scripts/nph-brs.exe?d=CHAP&s1=20.45.h2.&Sect6=HITOFF&l=20&p=1&u=~public/chap1.htm&r=1&f=G>; KING COUNTY, WASH., CODE ch. 12.19 (2006), available at <http://www.metrokc.gov/mkcc/code/15-Title%2012.pdf>; OLYMPIA, WASH., MUNICIPAL CODE ch. 3.18 (2004), available at <http://www.olympiamunicipalcode.org/A55799/Oly-muni-PUBLIC.nsf/30c2b313f243223f88255f9c007b495b/86257139002381f488256e760062632a?OpenDocument>; TUMWATER, WASH., MUNICIPAL CODE ch. 2.18 (2007) (effective Jan. 2, 2002), available at <http://www.tumwatermunicipalcode.org/Municipal%20code%20Title%20Ch2-18.html>.

Frustrated by the inability to accomplish their objectives at the statewide or national levels, different interest groups – particularly so-called “progressive” groups – see the smaller scale politics of the city as more amenable to government reform and serious policy experimentation. Exactly why certain interest groups have achieved more success on the local level than on the state or national stage is unclear. Some commentators have speculated that the smaller scale of city politics diminishes the influence of campaign contributions, at least as compared to the state and national levels. The decreased importance of campaign money, it is argued, allows cities to provide the best and last hope for a more responsive, democratic form of government not beholden to the moneyed special interests that are alleged to exert undue influence in Washington, D.C. and state capitals.²⁹ “Cities are where you can break through the big money, the media spin – everything that is wrong with our politics – and capture the public’s imagination,” says Madison, Wisconsin Mayor Dave Cieslewicz.³⁰ An alternative explanation for the proliferation of policy experiments of the politically “progressive” variety across cities is that the residents of America’s largest cities, which tend to have the most ambitious policy agendas, have a strong leftist political tilt.³¹ Ordinances passed by the nation’s largest cities may, therefore, simply reflect the left-leaning political preferences of their inhabitants.

Although many of the more noteworthy recent local ordinances, such as gay rights measures and efforts to combat global warming, appear to further a progressive political agenda, cities have also been at the forefront of a handful of issues more commonly advocated by politically “conservative” groups. For instance, in the face of the federal government’s perceived failure to control illegal immigration, a number of cities have passed ordinances seeking to address this issue.³² These ordinances sanction employers who hire illegal

²⁹ See Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2027 (2000) (reviewing GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999)), and contending that “citizens personally contact local elected officials more frequently than their federal or state counterparts,” and that “unitary democracy” of smaller jurisdictions encourages consensus decision-making over majority rule).

³⁰ John Nichols, *Urban Archipelago*, THE NATION, June 20, 2005, at 14.

³¹ For instance, in the 2004 presidential election, every city with a population greater than 500,000 voted for Democratic candidate John Kerry. *Id.* at 13.

³² *Congress’ Fiddling Leaves Cities Fighting Illegal Immigration*, USA TODAY, Sept. 5, 2006, at 10A (discussing a Hazelton, Pennsylvania city ordinance which fines landlords who rent to illegal immigrants); Stephanie Sandoval, *FB’s Housing Ordinance Differs From Other Towns’ Illegal Immigrants Restriction Based on Federal Subsidy Rules*, DALLAS MORNING NEWS, Nov. 29, 2006, at 1B (reviewing a Farmers Branch, Texas ordinance restricting illegal immigrants). See generally Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, MICH. L. REV. (forthcoming 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1006091#PaperDownload.

immigrants and landlords who rent to them.³³ Cities around the country have also passed numerous ordinances seeking to tighten restrictions on sex offenders, some of which effectively banish offenders from the city limits.³⁴ Like the progressives who feel left out of the statewide and national debates on issues like public health and global warming, political conservatives sometimes feel that their political preferences have a better chance of being heard and acted upon at the local level, particularly where the state legislature is controlled by more politically liberal forces. Thus, city policymaking does not necessarily tilt in any particular ideological direction. Even if “progressive” local policies predominate over “conservative” ones, however, it is in part because there are few large cities with politically conservative populations, and it is the larger American cities – with their stronger mayors and more professionalized city governments – that most often lead in policy innovation.

A large number of other innovative local measures are not easily pigeonholed into an ideological category like “progressive” or “conservative.” Many innovative local ordinances are pragmatic attempts to respond to city-specific, quality-of-life problems. In this vein, cities have imposed billboard restrictions,³⁵ regulated hours for jet skiing,³⁶ increased penalties for drunk driving,³⁷ limited the sale of spray paint,³⁸ and restricted the sale of

³³ Hazleton, Pennsylvania’s illegal immigration ordinance addressed both employers and landlords, and was recently invalidated as preempted by federal law by a federal district court in the leading case on this issue. See *Lozano v. Hazleton*, 496 F. Supp. 2d 477, 518, 532 (M.D. Pa. 2007). Hazleton has appealed the decision to the United States Court of Appeals for the Third Circuit. See Jill Whalen, *Hazleton Appeals Immigration-Law Decision*, SCRANTON TIMES-TRIB., Aug. 24, 2007. Because the primary preemption arguments made against local immigration regulations (such as Hazleton’s) are based on federal, rather than state, law, I do not address these ordinances in detail in this Article.

In part due to the substantial litigation costs Hazleton has accrued by defending its immigration ordinance in the federal courts, cities have lately reconsidered the wisdom of passing similar ordinances. See Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at A1.

³⁴ See Laura Mansnerus, *Zoning Laws That Bar Pedophiles Raise Concerns for Law Enforcers*, N.Y. TIMES, Nov. 27, 2006, at A1.

³⁵ *Scadron v. City of Des Plaines*, 606 N.E.2d 1154 (1992) (upholding local limits on billboards).

³⁶ *Miller v. Fabius Twp. Bd.*, 114 N.W.2d 205 (Mich. 1962); *Weden v. San Juan County*, 958 P.2d 273 (Wash. 1998).

³⁷ *Simpson v. Municipality of Anchorage*, 635 P.2d 1197 (Alaska Ct. App. 1981) (challenging city ordinance making it illegal to have BAC of greater than 0.10 when state law only allowed a presumption of drunk driving to be drawn from such a BAC level); *City of Seattle v. Williams*, 908 P.2d 359 (Wash. 1995) (striking down city ordinance establishing 0.08 as maximum legal blood-alcohol content (“BAC”) for drivers whereas state law ceiling was 0.10).

³⁸ See *Sherwin-Williams Co. v. City of Los Angeles*, 844 P.2d 534 (Cal. 1993) (holding aerosol ordinance not preempted by state law).

fireworks,³⁹ not so much in an attempt to influence national or statewide policy, but rather to address a local problem that the city is experiencing, or is bothered by, to a greater degree than the rest of the state.

There is a well-known darker side to local authority, however. Despite the many well-meaning and successful policy experiments cities have adopted in recent decades, it is widely acknowledged that municipalities sometimes use their power more to exclude undesirable persons and land uses than to engage in good-faith policy experimentation, often in an attempt to externalize certain social costs on to other communities. City bans on sex offenders are arguably examples of this phenomenon.⁴⁰ Municipal bans on trash disposal are another example.⁴¹ As I will explain in Part III, while implied preemption may at times be a “dark shadow” hovering over good-faith policy experimentation by cities, it can also limit cities’ ability to use their lawmaking power for parochial or exclusionary ends.

A. *The Old Regime of Dillon’s Rule*

Preemption only occurs when two levels of government operate within the same sphere. For much of American history, while the state’s sphere was large – indeed, nearly boundless⁴² – the cities’ scope of authority was narrow, as postulated in “Dillon’s Rule.” Named for John F. Dillon, the Iowa Supreme Court (later, federal circuit) judge who published an influential treatise on municipal corporations shortly after the Civil War, the eponymous rule held that local units of government were mere administrative conveniences of the state with no inherent lawmaking authority.⁴³ Under Dillon’s Rule, municipalities possessed only those powers indispensable to the purposes of their incorporation as well as any others expressly bestowed upon them by the

³⁹ *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. Dist. Ct. App. 2005) (maintaining that only a “limited conflict” existed between county fireworks ordinance and state statute, which could be severed from the remainder of the ordinance); *Brown v. City of Yakima*, 807 P.2d 353 (Wash. 1991) (holding Yakima fireworks ordinance not preempted by state statute).

⁴⁰ See *supra* note 34.

⁴¹ See *infra* note 298.

⁴² See, e.g., *Gangemi v. Berry*, 134 A.2d 1, 5 (N.J. 1957) (“The American [state] legislatures ‘have the same unlimited power in regard to legislation which resides in the British parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American states.’” (quoting *Thorpe v. Rutland & Burlington R.R.*, 27 Vt. 140, 142 (1854))).

⁴³ The Supreme Court endorsed Judge Dillon’s rule, at least as a matter of federal constitutional law, in the landmark case of *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), which held that there was no fundamental federal constitutional right to any form of local government. According to *Hunter*, cities were mere “political subdivisions” and “convenient agencies” that the state could abolish at will. *Id.* at 178.

state.⁴⁴ In construing these powers, “[a]ny fair, reasonable doubt concerning the existence of power [was to be] resolved . . . against the corporation.”⁴⁵ Similarly, counties possessed little or no lawmaking authority, but were instead considered administrative arms of the state government.⁴⁶

Dillon’s Rule, which gained wide acceptance among the legal and political elites of the mid- to late-nineteenth century, restricted local power to a narrow range of subjects. While municipalities possessed some policymaking authority in matters related to the essentials of their incorporation, they had no authority, in the absence of an express grant from the legislature, to exercise the state’s police power.⁴⁷ Because express grants of broad authority to cities from the legislature were rare, and narrowly interpreted when given, there were few opportunities for cities to engage in substantive policymaking in a Dillon’s Rule regime. As a result, state and local regulation rarely overlapped, and preemption was, therefore, only a remote possibility. While preemption was hypothetically possible in a Dillon’s Rule regime – and only a handful of states still apply the rule to all of their cities⁴⁸ – most challenges to city authority under Dillon’s Rule were premised on the theory that the city had acted *ultra vires* – that is, beyond its meager lawmaking powers.⁴⁹

⁴⁴ 1 JOHN F. DILLON, *THE LAW OF MUNICIPAL CORPORATIONS* § 9b, at 93 (2d ed. 1873) (“[Municipalities] possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them . . .”). For more on Dillon’s Rule, which some courts refer to as the “Dillon Rule,” *Bd. of Supervisors of Culpeper County v. Greengael, L.L.C.*, 626 S.E.2d 357, 368 n.9 (Va. 2006), see HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER* 2-3 (1983); David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 506-10 (1999); Frug, *supra* note 2, at 1109-13.

⁴⁵ DILLON, *supra* note 44, § 55, at 173.

⁴⁶ See BRIFFAULT & REYNOLDS, *supra* note 4, at 8.

⁴⁷ In a few states, particularly the New England states, whose participatory “township” form of government has been extolled (and romanticized) as far back as de Tocqueville, the state legislatures granted towns a substantial amount of authority, at least as compared to other municipalities of the era. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 66-70 (8th ed. 1848). Even de Tocqueville, however, in praising the New England townships, remarked that their “sphere [of authority] is indeed small and limited.” *Id.* at 65.

Judge Dillon recognized the New England towns’ relatively broad powers in his treatise on municipal corporations, devoting two sections to them. See DILLON, *supra* note 44, §§ 11-12, 98 (“The towns are charged with the support of schools, the relief of the poor, the laying out and repair of highways, and are empowered to preserve peace and good order, maintain internal police, and direct and manage generally . . . their prudential affairs.”). Dillon did not view the New England town’s authority as problematic for his anti-localist thesis, however, because, as he noted, the town’s powers had been specifically granted by state statute. *Id.*

⁴⁸ See discussion *infra* note 64.

⁴⁹ See, e.g., *Early Estates, Inc. v. Housing Bd. of Review of Providence*, 174 A.2d 117 (R.I. 1961) (holding Providence’s ordinance requiring hot water in residences *ultra vires* because state had granted city authority only to set minimum standards for conditions of

B. *The Emergence of Home Rule*

Dissatisfied with the scant authority Dillon's Rule provided, states gradually began to grant more substantive policymaking power – what came to be known as “home rule” – to their cities at the end of the nineteenth and beginning of the twentieth centuries. While “home rule” has taken on a wide variety of meanings in local government law, I use it to mean a system of state and local relations that gives some degree of permanent substantive lawmaking authority to localities beyond that which was provided by the traditional Dillon's Rule regime. The home-rule movement of the late nineteenth and early twentieth centuries has most commonly been described as a pro-democratic effort to increase local autonomy.⁵⁰ Recently, Professor David Barron has questioned whether the early home-rule movement actually expanded local power in a meaningful way, arguing instead that home rule actually confined local power to a sphere less likely to interfere with business interests.⁵¹ While it is beyond the scope of this Article to analyze thoroughly the differences between Professor Barron's revisionist version and the traditional account of home rule as a democracy-empowering movement, it suffices to say that the early home rule provisions at least nominally increased cities' organic policymaking authority beyond Dillon's Rule's meager grant. At the least, therefore, the early home-rule movement provided a foundation for the broader powers states would later bestow upon cities.

The earlier versions of home rule granted substantive lawmaking power to cities, but generally limited this authority to matters of “local” concern. When a city acted within the sphere of “local” concern, its actions were protected from state interference.⁵² That is, even if the state legislature wanted to preempt a city ordinance that regulated a matter of “local” concern, it was prohibited from doing so, particularly if the state's home rule system was enshrined in the state's constitution. As a result, many early home-rule

buildings). In a more recent example from Virginia, which remains a Dillon's Rule state, Arlington County's decision to extend health benefits to unmarried “domestic partners” of county employees was challenged as invalid. *Arlington County v. White*, 528 S.E.2d 706, 709 (Va. 2000) (striking down the Arlington domestic partner benefits ordinance not on preemption grounds, but because the county's decision to treat domestic partners as “dependents” was *ultra vires*).

⁵⁰ See, e.g., DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY STATE HANDBOOK 11 (2001).

⁵¹ Barron argues that the early home-rule movement actually intended to confine local power to “a quasi-private sphere” even more effectively than Dillon's Rule. According to Barron, the early impetus for home rule came from conservative rich elites who sought to maintain a small-scale, low-tax privatized version of local government. Under a Dillon's Rule regime, cities could have their powers expanded provided that the state legislature so approved, whereas under the early home-rule regimes the rigidity of the newly established home rule actually served as a straitjacket, limiting an expansive use of civic power. Barron, *supra* note 13, at 2291-2300.

⁵² See *id.* at 2290.

regimes established essentially separate – and exclusive – sovereigns whose areas of authority did not overlap, thereby creating little potential for preemption.⁵³ This earlier form of home rule came to be known as “imperio” because it established an “imperium in imperio,” or a “government within a government.”⁵⁴ Under imperio home rule, state courts were the ultimate arbiters of city power because they had the power to interpret what is “local.”⁵⁵ Advocates of city power over time, however, grew increasingly frustrated with the state courts because judges often interpreted “local” quite narrowly, thereby severely limiting cities’ policymaking authority.⁵⁶ This frustration led to calls for further home rule reform that would more securely expand cities’ lawmaking authority.⁵⁷

In the 1950s and 1960s, a second wave of home rule reform sought to implement a more flexible and less formalistic method for distributing power to cities. Leading civic organizations such as the American Municipal Association (“AMA”) and the National Municipal League (“NML”) proposed home rule models that granted the “police power” to local governments, subject to denial of power in a particular substantive field by specific act of the state legislature.⁵⁸ The AMA and NML proposals differed significantly from the imperio approach in that they no longer required state courts to assess whether a particular matter was of “local” concern to determine whether municipal authority was valid. Rather, the new proposals presumed that cities would have any power the state possessed, unless the state legislature had exclusively reserved power over a particular subject matter to the state.⁵⁹ Not

⁵³ *City of New Orleans v. Bd. of Comm’rs*, 640 So. 2d 237, 242 (La. 1994) (stating that under the old system of home rule the city acted “without fear of the supervisory authority of the state government” so long as it acted in the “local” realm only).

⁵⁴ *St. Louis v. W. Union Tel. Co.*, 149 U.S. 465, 468 (1893); *City of New Orleans*, 640 So. 2d at 241-42 (reviewing the “imperio” model of home rule); BRIFFAULT & REYNOLDS, *supra* note 4, at 282-83; Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 660-61 (1964).

⁵⁵ See BRIFFAULT & REYNOLDS, *supra* note 4, at 282-83; Barron, *supra* note 13, at 2325-26; Sandalow, *supra* note 54, at 660.

⁵⁶ See BRIFFAULT & REYNOLDS, *supra* note 4, at 282-83; Sandalow, *supra* note 54, at 685-92.

⁵⁷ See Sandalow, *supra* note 54, at 685-92.

⁵⁸ See JEFFERSON B. FORDHAM, AMERICAN MUNICIPAL ASSOCIATION, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE (1953); NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION § 8.02 (1968); see also BRIFFAULT & REYNOLDS, *supra* note 4, at 282-83; Barron, *supra* note 13, at 2325-27; Sandalow, *supra* note 54, at 685-92.

⁵⁹ The NML model slightly enhanced the protection afforded to local governments provided by the AMA model in that the NML model required the state legislature to deny municipal power only by general law; some states that have adopted the NML model have interpreted it to require *express* denial of a certain power by the state legislature. See *City of New Orleans*, 640 So. 2d at 243 (comparing both models). Many states with legislative

having to worry about confining their policymaking to some ambiguous “local” sphere, cities would thus have greatly expanded opportunities to make policy. In large part because they intended to substitute the legislature for the judiciary as the primary adjudicator of the extent of home rule powers, the AMA/NML approaches came to be known as “legislative” home rule.⁶⁰

Legislative home rule, which has become the majority approach,⁶¹ vastly expanded the areas in which municipalities could govern, creating the potential for much greater overlap between state and local legislation. Whereas the inquiry as to whether a city had the power to pass a particular ordinance was a logical predicate of the preemption question in an imperio state, the issues of city power and preemption merge in a purely legislative home rule system insofar as the state’s grant of power to a city is conditioned upon the city not passing an ordinance “in conflict with state law.”⁶² Hence, an ordinance conflicting with state law is necessarily *ultra vires* in a legislative home rule system because it lies outside the grant of authority to the city. The courts settle the critical question of whether a local ordinance conflicts with state law through the doctrine of preemption, including implied preemption. Thus, despite the second-wave home-rule reformers’ intent to remove the responsibility for deciding the scope of local authority from the judiciary, legislative home rule traded the much-criticized judicial role of determining whether a subject matter was properly “local” for the equally controversial task of applying the doctrine of preemption.

The result of the past 125 years of home rule evolution is a patchwork of approaches to local authority across the 50 states.⁶³ While a few states retain Dillon’s Rule,⁶⁴ most states now have at least some version of legislative home

home rule have, nonetheless, expressly reserved the broad and vaguely defined area of “private law” – which is often interpreted to include the law of contracts, property, torts, and family relations – to the state. See generally Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671 (1973). Because the area of “private law” is so broad that it might swallow cities’ home rule authority, many states allow municipal encroachments into this area so long as they are incidental to the exercise of an independent city power. See *City of Atlanta v. McKinney*, 454 S.E.2d 517, 520 (Ga. 1995); *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1160-64 (N.M. Ct. App. 2005). The private law exception is a primary reason cities’ efforts to extend marriage to gays were invalidated. Schragger, *supra* note 24, at 155.

⁶⁰ See BRIFFAULT & REYNOLDS, *supra* note 4, at 282-83.

⁶¹ See *infra* note 65.

⁶² See, e.g., FLA. CONST. art. VIII, § 1 (“Counties . . . shall have all powers of local self-government not inconsistent with general law . . .”).

⁶³ BRIFFAULT & REYNOLDS, *supra* note 4, at 283; George D. Vaubel, *Toward Principles of State Restraint upon the Exercise of Municipal Power in Home Rule*, 20 STETSON L. REV. 845, 871-72 (1991).

⁶⁴ Because of the diversity of approaches to local authority among the states – some states, for instance, apply Dillon’s Rule to most cities but not to a select few – it is difficult to get a precise count. Virginia and Vermont are the states that perhaps most clearly retain

rule, in which the state legislature has significant authority to preempt local ordinances.⁶⁵ Moreover, even in states that are commonly considered imperio regimes, it is now widely acknowledged that there are matters of mixed “local/statewide” concern in which both the state and city may legislate, thus raising the possibility of preemption in the mixed sphere.⁶⁶ As a result, preemption – particularly, implied preemption – has become the primary battleground for determining the parameters of local authority in modern home-rule regimes.

C. *Competing Normative Assessments of Home Rule*

1. Justifications for Home Rule

Home rule’s steady expansion throughout the United States since the late nineteenth century demonstrates the widespread popularity of local autonomy. Going back at least as far as Alexis de Tocqueville, political and legal theorists have expounded upon the benefits offered by meaningful local government.⁶⁷ At the risk of oversimplification, the arguments made in favor of enhanced city power can be distilled into two strains. The first argument extols cities as

Dillon’s Rule. *See supra* note 49 (discussing Virginia as clearly retaining Dillon’s Rule); *see also In re Ball Mountain Dam Hydroelectric Project*, 576 A.2d 124, 126 (Vt. 1990). Three other states – Alabama, New Hampshire, and Nevada – treat localities slightly less harshly than the old-fashioned Dillon’s Rule, but provide limited home rule only for certain jurisdictions, and are therefore sometimes also referred to as Dillon’s Rule states. *See KRANE ET AL.*, *supra* note 50, at 24-25 (discussing Alabama’s lack of meaningful home rule); *id.* at 270 (“Nevada . . . continues to be[] a classic Dillon’s Rule state.”); *id.* at 278 (“New Hampshire is not legally a home rule state . . .”). Arkansas has home rule for counties but applies Dillon’s Rule to cities. *Id.* at 50.

⁶⁵ Just as it is difficult to provide a precise count of Dillon’s Rule states, so is it difficult to count accurately home-rule states. *Compare* BRIFFAULT & REYNOLDS, *supra* note 4, at 268 (finding that as of 1990, 48 states had some form of home rule for at least some cities and 37 states had some form of county home rule), *with* KRANE ET AL., *supra* note 50, at 14 (finding that 45 states have home rule regimes) (citing Timothy D. Mead, *Federalism and State Law: Legal Factors Constraining and Facilitating Local Initiatives*, in *HANDBOOK OF LOCAL GOVERNMENT ADMINISTRATION* 31, 36 (John J. Gargan ed., 1997)). It is even more difficult to offer a precise head count of imperio versus legislative states. Professor Timothy Mead counts 26 legislative states and 19 imperio states, Mead, *supra*, while David Barron has observed that “very few state[s]” have imperio regimes. David J. Barron, *A Localist Critique of the New Federalism*, 51 *DUKE L.J.* 377, 392 (2001).

⁶⁶ Colorado, for instance, is often considered one of the strongest imperio states in terms of the immunity it provides to city ordinances concerning “local” affairs. Nonetheless, even in Colorado, implied preemption arises when the matter in dispute is of a mixed statewide / local nature. *See, e.g., City of Northglenn v. Ibarra*, 62 P.3d 151, 155 (Colo. 2003).

⁶⁷ DE TOCQUEVILLE, *supra* note 47 (extolling the virtues of the New England township); *supra* notes 29-30 and accompanying text; *see also* JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1890), *reprinted in* *ON LIBERTY AND OTHER ESSAYS* 205, 411-12 (John Gray ed., 1991).

“laboratories” for policy experiments. Under this view, the more devolved power the better, as local units of government can adopt different policies to better reflect the needs or political values of their constituents. Having a large number of cities allows policy innovation that would never occur if all policymaking took place only on the state and federal levels alone.

The second major argument in favor of home rule is the communitarian or democracy-building argument. This school of thought promotes home rule because of the unique educational benefits and heightened civic participation that, in its view, only local government can provide and foster.⁶⁸ Empowering local government, it is said, enables public participation and the creation of a sense of community in a way that is impossible at the state or national level.⁶⁹ The communitarian argument, which can be traced loosely to de Tocqueville, expects citizens to be more interested in local politics than they are in state or national affairs, as well as better able to access and influence their local officials.⁷⁰ Communitarians view the geographical proximity of local government – as opposed to the more distant state and national capitals – as essential to the establishment and strengthening of organic community ties.⁷¹

The pro-experimentation and communitarian arguments for home rule are not necessarily in tension. Cities may be incubators of new and interesting policies precisely because of the heightened citizen involvement and decreased influence of special interest groups that only local government allows.⁷² Moreover, the subscribers to each of these schools of thought likely favor strong local power, as it provides more opportunity for cities to innovate as

⁶⁸ Indeed, theorists like de Tocqueville and John Stuart Mill have argued that local government can serve as an essential “school” for preparing persons to be citizens in a democracy. See DE TOCQUEVILLE, *supra* note 47, at 60 (“Municipal institutions are to liberty what primary schools are to science; they bring it within the people’s reach, they teach men how to use and how to enjoy it.”); MILL, *supra* note 67, at 413 (explaining how local government can serve the function of “political education” to the “lower grade in society” likely to occupy positions in it).

⁶⁹ Gerald Frug is a well-known advocate of this school of thought. See generally GERALD FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999); Frug, *supra* note 2, at 1120-49. In his review of *City Making*, Rick Hills offers a description of four “democratic advantages” small local government might offer: 1) agendas that are tightly constrained to issues that are likely to be of intense concern to local residents; 2) an increase in the ratio of elected officials to voters, thereby ensuring that larger numbers of citizens have direct experience in government; 3) a reduction in the costs of political campaigns; and 4) the promotion of “what Jane Mansbridge refers to as ‘unitary democracy’ – a form of politics stressing rule by consensus rather than majority, face-to-face contact rather than secret ballot, and equal respect rather than equal protection of interests.” Hills, *supra* note 29, at 2026-28 (citing JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 23-25 (1980)).

⁷⁰ See DE TOCQUEVILLE, *supra* note 47, at 66-70.

⁷¹ See Hills, *supra* note 29, at 2027.

⁷² See text accompanying notes 29-31.

well as more of a reason for citizens to care about local government. Despite the arguments' significant overlap, however, the innovation argument presents a more compelling justification for home rule, and will serve as a normative touchstone for my discussion of preemption.

Home rule allows cities to experiment with new and interesting policies that, for whatever reason, the state and federal governments may be unprepared or politically unable to adopt. If and when these policies "work," they may percolate both out (to other cities) and up (to other levels of government – whether state or federal). City experimentation is an essential component of what, in the federalism context, Rick Hills has described as "political entrepreneurship."⁷³ Cities often lead in setting policy that Congressmen and state legislators have failed to address, whether due to greater policy risk aversion or fear of offending entrenched and well-financed interest groups that wield significant influence.⁷⁴ Once a city or a number of cities have put an issue on the nation's policy agenda, however, Congress or state legislatures may feel more compelled to address it.⁷⁵ Cities, therefore, can serve as a "destabilizing" force in state and national policy debates, disrupting the state legislative and Congressional stasis on policy matters of significance.⁷⁶ Even if Congress and/or the statehouses continue to avoid an issue, other cities may decide to take action after assessing the first city's experiment.

Even when a city's new policy is of no instructive use to the rest of the state or nation, it can nonetheless provide a level of regulation or government service more finely tailored to a particular city's needs and political preferences. For example, in an effort to crack down on graffiti, Los Angeles placed stricter restrictions on the sale of aerosol paint than those provided by state law.⁷⁷ As part of the same effort, Los Angeles placed restrictions on the sale of broad-tipped marker pens, another source of graffiti which state law had not theretofore restricted.⁷⁸ Assuming the (admittedly unlikely) scenario that no other city in California or the nation had a graffiti problem as bad as that of Los Angeles, the city's anti-graffiti ordinance was still potentially socially beneficial in that it attempted alleviate a problem unique to Los Angeles, or a problem that bothered inhabitants of Los Angeles more than those of other cities. Therefore, even when it does not percolate out or up, a local policy experiment can still benefit the residents of the city that adopts it.

⁷³ Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 21 (2007).

⁷⁴ *Id.* at 19; see also Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 35-36, 49 (1991) (explaining ways in which interest groups influence legislation).

⁷⁵ Hills, *supra* note 73, at 21.

⁷⁶ Cf. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

⁷⁷ *Sherwin-Williams Co. v. City of Los Angeles*, 844 P.2d 534 (Cal. 1993).

⁷⁸ *Id.*

In contrast to the innovation rationale for robust home rule, the communitarian/democracy-building argument is overbroad insofar as it envisions a New England-style town democracy, which is hardly the case in large American cities with populations in the millions or hundreds of thousands. It is possible that citizens in, say, New York City, a city of eight million people, feel just as disconnected from their municipal government as other citizens feel disconnected from their state and federal governments (as of the 2000 census, New York City's population of 8,008,278 exceeded the population of all but 11 states).⁷⁹ Nonetheless, it is often the largest cities – such as New York, San Francisco, and Chicago – that offer the most significant innovations in public policy, even though a communitarian might expect citizens in these large cities to be democratically disengaged. The argument that stronger local government instills in citizens a sense of community is also difficult to prove, and is perhaps belied by Americans' exceptional mobility.⁸⁰ Further, Americans tend to be more aware of national politics than local politics, and vote in national elections (or elections in which at least a portion of the vote is for federal office) at much higher rates than they vote in purely local elections.⁸¹

Moreover, the policy experimentation case for home rule is broad enough to embrace the communitarian argument for local authority without depending on it. It may well be that cities pass ordinances on issues that neither the state nor federal governments address because local government is closer to its voters and more responsive to their will. On the other hand, even if this were not the case – assume that an autocrat governed each city undemocratically and different local policies reflected only the differing visions of the autocrats⁸² – policy experimentation would still be of value for two reasons. First, cities could serve as policy incubators for the states and the federal governments, even if their new policies did not necessarily represent the views of their inhabitants. Second, at least at the margins, people could be expected to move to cities that offered their preferred package of local policies, thereby increasing social utility even if political participation is nonexistent.

Professor Charles Tiebout most famously articulated the view that citizens are likely to “vote with their feet” in choosing where to live. Tiebout

⁷⁹ See U.S. CENSUS BUREAU, *Ranking Tables for States: Population in 2000 and Population Change from 1990 to 2000*, in CENSUS 2000 (2001), available at <http://www.census.gov/population/cen2000/phc-t2/tab01.pdf>; see also U.S. CENSUS BUREAU, *Ranking Tables for Incorporated Places of 100,000 or More: 1990 and 2000*, in CENSUS 2000, *supra*, available at <http://www.census.gov/population/cen2000/phc-t5/tab02.pdf>.

⁸⁰ See Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L.J. 481, 489-97 (2004).

⁸¹ See Gerald M. Feige, Comment, *Refining the Vote: Suggested Amendments to the Help America Vote Act's Provisional Balloting Standards*, 110 PENN ST. L. REV. 449, 462 (2005).

⁸² Of course, even autocrats are likely to feel compelled to bend to popular will to some degree. See Benjamin Toronto Davis, *Constitutional Adjudication*, 19 UTAH B.J. 22, 24 (2006).

postulated that under a certain set of strong assumptions, “consumer-voters” would express their preferences for taxation and public services by moving to the local jurisdiction, or “firm,” that offered them the best package.⁸³ Voters preferring (and willing to pay for) a high level of government services – e.g., well-funded schools, parks, and public libraries – would move to cities that offered a high-tax, high-service package; voters preferring a more minimal level of government would move to jurisdictions with lower taxes and fewer services. While Tiebout’s theory is predicated on a number of highly stylized assumptions,⁸⁴ such as a lack of externalities in city services and full mobility of consumer-voters, empirical analyses have demonstrated that in metropolitan areas with a large number of municipalities, his theory helps explain residential choices.⁸⁵

Further, while Tiebout’s work focused on bread-and-butter issues like taxes and traditional local government services, his theory could be expanded to include consideration of more ideologically motivated, less pragmatic city policies like gay rights and “living wage” ordinances. A “consumer-voter” may be attracted to a city because of its policies in these less traditional areas of municipal regulation even if such policies provide him with no tangible benefit. For instance, a heterosexual person may greatly value living in a city that offers expanded civil rights to gays and lesbians, both because he receives psychic benefits from knowing that his community provides greater rights to gays and lesbians and because he wishes to signal to others that he is particularly tolerant of gays and lesbians. Similarly, a wealthy doctor may greatly value living in a community that has passed a “living wage” ordinance because he too may receive a psychic benefit from knowing that his community engages in local redistribution, and he also may wish to signal his altruistic characteristics to others by choosing to reside in such a community.⁸⁶ In the latter example, the doctor may prefer to select a local government that offers extensive redistributive programs even if that means he pays higher taxes, so long as the psychic benefits of the programs outweigh any increased “pain” he experiences from higher taxes. Robust local authority, therefore, offers citizens not just a greater selection of bread-and-butter services and tax

⁸³ Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

⁸⁴ *Id.* at 419 (listing seven assumptions); see also Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057, 1071-72 & n.61 (2007) (explaining limitations of Tiebout’s theory).

⁸⁵ See Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 520-21 (1991) (discussing empirical evidence that somewhat validates Tiebout’s Theory).

⁸⁶ See Gillette, *supra* note 84, at 1072-73 (using “spatial theory” to explain why well-off residents may support local redistributive policies).

packages but also a more extensive menu of communities to embrace for political or ideological reasons.⁸⁷

2. Criticisms of Home Rule

The academic debate concerning the value of home rule focuses not just on its purported justifications, but also on its widely recognized flaws. Critics have decried home rule for encouraging parochialism, isolation, and segregation. By granting units of local government more substantive powers, the criticism goes, states only enable localities – particularly well-heeled suburbs – to better pursue their selfish motives. Desiring to keep property taxes low and exclude social “undesirables,” municipalities often engage in exclusionary zoning, isolating the poor (and often racial and ethnic minorities) in decaying urban cores or in a few low-income, low-service cities within the region.⁸⁸ By spreading policymaking authority among multiple jurisdictions, home rule may create a “race to the bottom” in which cities compete to secure jobs and tax revenue by slashing corporate taxes or too readily permitting development, thereby exacerbating suburban sprawl.⁸⁹ With regard to

⁸⁷ In this sense, the experimentation argument also subsumes the communitarian argument insofar as the participatory nature of local government may be a factor that attracts “consumer-voters” to a particular municipality. See, e.g., Gabrielle Glaser, *Portland Offers Plenty for Older Adults*, THE OREGONIAN, Oct. 2, 2007 (speculating that Portland, Oregon’s “civic-minded” reputation attracts new residents). Consumer-voters who care less about community involvement may seek out cities that offer fewer opportunities for local democratic decision-making.

⁸⁸ See *So. Burlington County NAACP v. Twp. of Mt. Laurel*, 336 A.2d 713, 723 (N.J. 1975) (stating that in developing municipalities “[a]lmost every one acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base, despite the location of the municipality or the demand for varied kinds of housing”); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2016 (2000) (“[T]he desire for lower taxes and avoidance of the redistributive outlays of larger, older cities and the desire for racial exclusion are the two factors most prominently identified by researchers for the formation of new local governments.”); Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173, 1183 (1996) (“Too often local citizens are united . . . only by their shared disdain for the poor or for minority groups. [Local] ‘autonomy’ signifies the effort to fence out those who threaten their homogenous lifestyles or those who threaten to consume more in services than they pay in taxes”); Hills, *supra* note 29, at 2009 (explaining that critics of home rule believe “local governments are less like Athens and more like Mount Laurel: rather than promoting deliberation about public affairs, they promote anxious efforts by the suburban middle class to pursue low taxes, high property values, and homogenous neighborhoods through exclusionary zoning”).

⁸⁹ See Frank S. Alexander, *Inherent Tensions Between Home Rule and Regional Planning*, 35 WAKE FOREST L. REV. 539, 551 (2000) (“The ability of the state . . . to address the problems being posed by urban sprawl runs directly into [the] fragmented allocation of

preemption, therefore, a vociferous critic of home rule might support more frequent preemption of local power so as to weaken the very local power that has allegedly been used for such nefarious purposes.

There is much validity to the critique that home rule enables parochial local action, but this critique often focuses on a relatively narrow slice of municipal policymaking. Many of the innovative policies adopted by cities in recent years are not attempts to exclude undesirable persons or land uses, but are rather “good-faith” policy experiments; that is, attempts to fashion solutions to social problems that may be instructive to other cities and states while imposing relatively little tangible harm, if any, on surrounding communities. For instance, a city that passes an ordinance requiring city contractors to provide domestic partnership benefits cannot plausibly be said to be acting in its parochial self-interest. Indeed, the city may be legislating *against* its “rational” self-interest in its perceived pursuit of social justice insofar as it is likely to pay more to city contractors as a result of its new policy.⁹⁰ In Part III, I propose an approach to preemption that recognizes a distinction between “good-faith” local policy experiments, which are not likely to externalize social costs on to other communities, and parochial local ordinances, affording the former a presumption of validity not granted to the latter. Before explaining this proposal in more depth, however, it is useful to examine critically the current state of implied preemption doctrine among the state courts and the contexts in which it is applied.

II. IMPLIED PREEMPTION AS A TOOL OF INTEREST GROUPS

Intrastate preemption is best understood less as a matter of abstract logic and more as one weapon among many used by interest groups to oppose local policies they dislike. Through implied preemption, in particular, interest groups seek relief from the local laws they dislike by turning to the courts, rather than – or in addition to – pursuing other options to further their interests. These other options include lobbying the local government that enacted the disliked ordinance to repeal it, or lobbying the state legislature for an express preemption provision supplanting the disliked ordinance. This Section will examine the groups that most frequently use implied preemption as a weapon against local ordinances and assess the doctrine courts have crafted for litigants to use in this regard.

authority [between local home rule and state government].”); Barron, *supra* note 13, at 2257-59 (describing perceived tension between home rule and sprawl).

⁹⁰ See Gillette, *supra* note 84, at 1065-66; see also David Graeber, *Army of Altruists*, HARPER’S, Jan. 2007, at 32 (questioning the notion that human behavior “can be understood as a matter of economic calculation, of rational actors trying to get as much as possible out of any given situation with the least cost to themselves”).

A. *Frequent Opponents of Local Regulation*

The most common opponents of the assertion of local authority for regulatory purposes are businesses. Many of the innovative policies cities have adopted in recent years – from a higher minimum wage to smoking bans to a ban on trans fats – impose some new cost or burden on businesses, and the business community often opposes such measures on the grounds that the measures will cut into profits and perhaps force some businesses to either close or relocate. The business community, of course, is not a monolithic entity. Some businesses may stand to benefit from a particular local ordinance that will hurt others. One might expect that proposed local action would sometimes receive both support and opposition – perhaps at near-equal levels – from members of the business community. For instance, San Francisco’s recent ordinance banning large stores from using certain plastic bags might be seen as a boon to the industries that produce paper bags and the biodegradable plastic bags permitted under the ordinance.⁹¹ Thus, one might have expected those industries to offer vocal support for the ordinance, perhaps countering protests from the grocery and non-biodegradable plastics lobbies. On the contrary, while the grocery lobby vigorously opposed San Francisco’s plastic bag ban, the paper industry and biodegradable plastic manufacturers offered no vocal support.⁹² The San Francisco plastic bag example reflects a common trend: the businesses that view themselves as hurt by a local regulation often protest vociferously and, in some instances, receive the support of groups that purport to represent the entire business community, such as chambers of commerce.⁹³ At the same time, perhaps out of a sense of “pro-business” solidarity, or because the gains from the proposed local regulation are too small and diffuse to those business that stand to benefit, support from the business community for many new local regulations is often muted or nonexistent.

There is another reason that the business community may be inclined to oppose local regulation vociferously even when some members of it stand to gain. As Rick Hills has explained, businesses that operate throughout the state or the nation often have an institutional interest in regulatory uniformity for its own sake. That is, even if an industry is indifferent to competing regulatory regimes, it would generally prefer that one statewide or national system of regulation be adopted.⁹⁴ For this reason, businesses that operate statewide or nationwide have an interest in opposing city-by-city regulations of certain aspects of their business. The opposition of the restaurant industry to New

⁹¹ See *supra* note 23.

⁹² See Editorial, *Neither Paper Nor Plastic*, SAN FRAN. CHRON., Mar. 27, 2007, at B6.

⁹³ Hills, *supra* note 73, at 22-23 (“Pro-preemption forces tend to be businesses and industry groups (e.g., the National Association of Manufacturers, the U.S. Chamber of Commerce, the Business Roundtable) . . .”).

⁹⁴ *Id.* at 22-23; see also Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 765 (2004) (explaining Hills’s argument that “well organized interest groups, such as business trade associations . . . are likely to strongly prefer uniform national rules”).

York City's ban on trans fats, for example, was based not just on the increased costs of using trans fats substitutes, but on the additional costs of non-uniformity.⁹⁵ Large fast-food chains feared that the local ban on trans fats would interfere with their national product distribution system and compromise their carefully cultivated nationwide brand image by causing, for instance, McDonald's French Fries in New York City to taste different from those served at franchise locations in other American cities.⁹⁶

The organizations that represent business interests in the public sphere – chambers of commerce and trade and industry associations – tend to lobby for regulatory uniformity even though not all of their members or purported constituents benefit from such uniformity. For some local, “mom-and-pop” restaurateurs, New York's trans fats ban may have offered a comparative advantage because these restaurants do not depend on a national supply chain nor have they cultivated a global brand image that might be affected by the change. Nonetheless, the National Restaurant Association, the self-described “leading business association for the restaurant industry,”⁹⁷ opposed New York's ban unequivocally, in part because it banned the use of a product that was legal elsewhere.⁹⁸ Like the National Restaurant Association and its opposition to New York City's trans fat ban, other leading business organizations generally lobby or litigate against local ordinances that impose new costs on some businesses even if some of their purported small-business constituents stand to benefit.⁹⁹ For these reasons, I will frequently refer to the “business community” as the primary opponent of increased local regulation and the primary proponent of preemption, whether in the statehouse or the courts.¹⁰⁰

⁹⁵ See MSNBC News Services, *New York City Passes Trans Fats Ban*, Dec. 5, 2006, <http://www.msnbc.msn.com/id/16051436/>.

⁹⁶ *Id.*; see also ERIC SCHLOSSER, *FAST FOOD NATION 5* (2002) (explaining that the key to a successful fast-food franchise is “uniformity” and the reassurance to customers that the products “are always and everywhere the same”).

⁹⁷ See National Restaurant Association, <http://www.restaurant.org/aboutus> (last visited Oct. 8, 2007).

⁹⁸ See News Release, National Restaurant Association, Dec. 5, 2006, <http://www.restaurant.org/pressroom/pressrelease.cfm?ID=1347> (last visited Oct. 8, 2007) (commenting on the trans fat ban and menu-labeling mandate in New York City).

⁹⁹ See Hills, *supra* note 73, at 22-23; see also MARK A. SMITH, *AMERICAN BUSINESS AND POLITICAL POWER: PUBLIC OPINION, ELECTIONS, AND DEMOCRACY* 49 (2000) (stating that while the majority of members of the national Chamber of Commerce consists of small firms, larger firms provide more of the organization's revenue (because dues are paid on a sliding scale) and dominate its board of directors).

¹⁰⁰ To be sure, the business community does not have a consistent interest in weakening local autonomy *per se*; rather, businesses are most interested in fighting increased local regulatory authority that threatens them with increased costs or burdens. Businesses frequently benefit from local authority exercised in the guise of relocation incentives, tax breaks, public funding of stadiums for sports teams, and other local programs designed to

In addition to the business community, there are two other identifiable groups that often express opposition to local regulation, at least in terms of raising the issue of preemption in litigation: public-sector labor unions and criminal defendants.¹⁰¹ Public-sector labor unions sometimes oppose local regulations that they think weaken the set of benefits they have received from the state. Because it is likely that the state legislature in a pro-union state will be more sympathetic to public employees than more politically conservative, anti-union cities within that state, it is not surprising that public employees' unions sometimes oppose local authority. For instance, public-sector labor unions have argued implied preemption when a city failed to honor a pay raise that the union considered mandatory statewide,¹⁰² or when a city adopted an ordinance prohibiting nepotism in municipal hiring when state law was silent.¹⁰³ Unlike the business community, however, public-sector labor unions have less of an institutional opposition to local authority. They do not stand to benefit as consistently from uniformity as large businesses do, for in an anti-union state, public employees' unions are likely to support local authority when promoting or defending the actions of a comparatively pro-union municipality.¹⁰⁴

Criminal defendants also frequently argue against local authority in those states where cities have the authority to pass criminal ordinances.¹⁰⁵ Unlike

retain and attract certain industries or businesses generally. See Gillette, *supra* note 84, at 6. Indeed, one of the primary critiques of home rule is that it gives too much authority to local governments, allowing businesses to play cities against each other in a "race to the bottom." See Richard Briffault, *Our Localism: Part II - Localism and Legal Theory*, 90 COLUM. L. REV. 346, 421 (1990); Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 900-01 (2007).

¹⁰¹ Businesses opposing local regulations may sometimes also be criminal defendants in that some local ordinances make failure to comply with the ordinance a criminal offense. See, e.g., *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1156 (N.M. Ct. App. 2005). The criminal defendants to whom I primarily refer in the text, however, are individuals targeted by local ordinances that seek to regulate individuals as such and not as business entities. Examples of local ordinances include those governing the carrying of switchblades, see, e.g., *City of Portland v. Lodi*, 782 P.2d 415, 415 (Or. 1989), or drunk driving, see, e.g., *City of Seattle v. Williams*, 908 P.2d 359, 360 (Wash. 1995). Some city ordinances punish individual behavior as a civil violation in addition to, or instead of, as a crime. See, e.g., *Bonita Springs, Fla.*, Ordinance No. 06-01 § 7 (2006).

¹⁰² *Dempsey v. City of Denver*, 649 P.2d 726 (Colo. 1982); see also *Billings Firefighters v. City of Billings*, 694 P.2d 1335, 1337 (Mont. 1985).

¹⁰³ See *Sioux Police Officers' Assoc. v. City of Sioux City*, 495 N.W.2d 687, 695 (Iowa 1993); see also *AFSCME v. City of Detroit*, 662 N.W.2d 695 (Mich. 2003); cf. *City of La Grande v. Pub. Employees Ret. Bd.*, 576 P.2d 1204, 1206 (Or. 1978).

¹⁰⁴ See, e.g., *AFSCME*, 662 N.W.2d at 699-700 (discussing how the municipal employee union supported the city council's effort to defy directives of state law regarding status of certain municipal employees).

¹⁰⁵ In some states, cities have no such authority, see, e.g., *Diamonds v. Greenville County*, 480 S.E.2d 718, 720 (S.C. 1997), while cities in some other states have only the

businesses and, to a lesser degree, public-sector unions, criminal defendants' opposition to local authority is expressed almost exclusively in litigation. Criminal defendants most commonly argue against local authority by claiming that the local ordinances they are accused of violating "conflict" with state law by prohibiting an activity permitted – i.e., not criminalized – by state law, or invade a field of criminal law that has been occupied fully by the state through its comprehensive (usually, more lenient) regulation.¹⁰⁶ Criminal defendants most commonly seek relief from local authority from the courts (as defenses to their criminal prosecutions), rather than by lobbying the state legislature because, unlike businesses and public-sector labor unions, criminal defendants have little, if any, political clout. Criminal defendants are generally not – or generally do not intend to be – "repeat players" with an institutional interest in the legal regime that affects them, and the few organized interest groups that sometimes push for positions advantageous to criminal defendants, such as state chapters of the American Civil Liberties Union and criminal defense lawyers' associations, are generally politically weak.¹⁰⁷

As opposed to public-sector unions and criminal defendants, businesses tend to be the most powerful and frequent opponents of increased local regulatory authority in both the political and judicial spheres – i.e., by lobbying for express preemption in the halls of the legislature or by arguing for implied preemption in the courtroom – and for that reason they will be the primary focus in my analysis of intrastate preemption doctrine. Before seeking relief from the state legislature or the courts, the first and most obvious place for businesses to oppose a potentially-harmful ordinance is at the local level before it is passed, either by lobbying members of the city council or, in the case of referenda, through paid political advertising designed to influence the plebiscite.¹⁰⁸ Business opposition can succeed in either diluting the effects of a proposed local regulation or killing it altogether. For instance, fierce opposition by Wal-Mart to a proposed Chicago ordinance that would have

power to legislate misdemeanors, but not felonies, *see, e.g.*, LA. CONST. art. VI, §§ 5, 9; *see also* *City of Baton Rouge v. Williams*, 661 So. 2d 445, 450 (La. 1995).

¹⁰⁶ *See* *O'Connell v. City of Stockton*, 162 P.3d 583 (Cal. 2007); *City of Portland v. Lodi*, 782 P.2d 415 (Or. 1989).

¹⁰⁷ *See* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2193 (2002). In addition to preemption challenges, criminal defendants frequently oppose local ordinances on the basis of federal constitutional concerns that are beyond the scope of this Article, such as notice and due process. *See* *Pierce v. Commonwealth*, 777 S.W.2d 926, 928 (Ky. 1989) (local criminal regulation raises concerns of abusive arrest and prosecution); *People v. Llewellyn*, 257 N.W.2d 902, 907 (Mich. 1977) (citing First Amendment concerns regarding a patchwork of municipal obscenity ordinances).

¹⁰⁸ For instance, after the Tucson City Council passed an ordinance imposing certain restrictions on "big box" retail establishments, Wal-Mart organized a petition drive to place the ordinance on the ballot for repeal by referendum in the next local election. *See* *City of Tucson v. Consumers for Retail Choice Sponsored by Wal-Mart*, 5 P.3d 934, 936 (Ariz. Ct. App. 2000).

required the retailer to pay higher wages and spend more money on benefits succeeded in defeating the measure. Despite the City Council's passage of the measure, Chicago's mayor, urged on by Wal-Mart, vetoed the legislation. Subsequently, the City Council, again urged on by Wal-Mart to oppose the bill, failed by one vote to override his veto.¹⁰⁹

When businesses fail in their attempts to oppose costly or burdensome ordinances at the local level, they often turn to the state legislature next, where they may exercise comparatively more political clout. In most states, particularly those with legislative home rule,¹¹⁰ the legislature is free to expressly preempt any city ordinance. Thus, businesses can ask the state legislature to nullify whatever local ordinances they find objectionable.¹¹¹ There are a variety of reasons why businesses may receive a more sympathetic reception in the halls of the statehouse than in some city halls. Many urban areas are populated by residents more politically liberal than those of the entire state. The elected representatives in certain urban areas – say, Madison, Wisconsin – may, therefore, be more likely to embrace regulatory policies opposed by business than their statewide counterparts in the Wisconsin state legislature. Further, the smaller scale of local politics often reduces the need for campaign money by municipal political officeholders, thereby decreasing the influence of well-organized and well-funded interest groups like the business lobby.¹¹² The costs of lobbying at the state level are generally higher than those at the local level, due to the increased transportation costs of lobbying in a (sometimes) faraway state capitol and the comparatively more extensive and drawn-out state legislative process. Whereas city councils are relatively small, unicameral institutions consisting of one or two dozen members,¹¹³ state legislatures are bicameral institutions (with the lone

¹⁰⁹ Fran Spielman, *Chicago Federation of Labor Not Backing Daley: Payback Time – Big-Box Veto Was Last Straw*, CHI. SUN TIMES, Jan. 17, 2007, at 22.

¹¹⁰ See *supra* notes 58-62 and accompanying text.

¹¹¹ Only in the few states with imperio regimes, where the subject matter concerned is deemed “local,” will the state legislature lack the power to expressly preempt. See *supra* note 65.

¹¹² See Gillette, *supra* note 84, at 63 (stating that “[s]tate officials are likely to need more substantial contributions to mount election campaigns” than local officials); see also Jennifer K. Bower, *Hogs and Their Keepers: Rethinking Local Power on the Iowa Countryside*, 4 GREAT PLAINS NAT. RES. J. 261, 263 (2000) (arguing that county regulations of large-scale livestock confinement facilities were more likely than state regulations because “[c]ounty politics . . . offers non-producers a local governing body more responsive to local majorities” than the state legislature, where “large hog producers maintain a power advantage . . . over diffuse non-producers concerned about feedlot harms”).

¹¹³ The average number of elected officials on a city's governing board – e.g., city council – as of a 1992 Census Bureau report was seven. See U.S. CENSUS BUREAU, 1992 CENSUS OF GOVERNMENTS, available at http://www.census.gov/prod/2/gov/gc/gc92_1_2.pdf. The number of city councilmen tends to be larger in America's biggest cities. *Id.* The following are the number of city councilmen or their equivalent in the top 10 American

exception of Nebraska) with scores of legislators¹¹⁴ and numerous committees through which legislation must first pass before reaching the floor.¹¹⁵ All of these conditions make lobbying the state legislature a more expensive and difficult endeavor than lobbying a city council. More disparate and less well-funded groups, such as those supporting the environment, consumer protection, public health, or the poor, therefore, may fare relatively better at the local level than at the state level, particularly in more politically liberal cities.

Examples abound of state legislatures overriding city ordinances at the behest of the business community. For instance, after three Oregon cities banned smoking in all bars and restaurants, the state legislature, at the urging of the restaurant industry, expressly preempted any other cities from passing similar bans.¹¹⁶ In Louisiana, business groups, fearful that New Orleans would pass its own minimum wage increase, successfully lobbied the state legislature and governor to support a law prohibiting cities from increasing the minimum wage above the state level.¹¹⁷ Additionally, in numerous states landlords have

cities in terms of population: New York City (51); Los Angeles (15); Chicago (50); Houston (14); Philadelphia (17); Phoenix (8); San Antonio (10); San Diego (8); Dallas (14); and San José (10); the average number of city councilmen in these cities is just under 20. *Id.* at A-41, A-120, A-121, A-140; The City of Los Angeles, City Council, <http://www.lacity.org/council.htm> (last visited Oct. 21, 2007); City of Houston, City of Houston eGovernment Center, <http://www.houstontx.gov/council/index.html> (last visited Oct. 21, 2007); City of Phoenix, City Government, Mayor & City Council, <http://phoenix.gov/CITYGOV/MAYORCOUNCIL/index.html> (last visited Oct. 21, 2007); City of San Antonio, Mayor & City Council, <http://www.ci.sat.tx.us/council/?res=1024&ver=true> (last visited Oct. 21, 2007); City of San Diego, City Council Offices, <http://www.sandiego.gov/citycouncil/> (last visited Oct. 21, 2007); Dallas City Government, Mayor & City Council, <http://www.dallascityhall.com/government/government.html> (last visited Oct. 25, 2007); City of San Jose, City Council, <http://www.sanjoseca.gov/council.html> (last visited Oct. 21, 2007).

¹¹⁴ There are currently 7,382 elected representatives in the 50 state legislatures, which translates to an approximate mean of 147 legislators. National Conference of State Legislatures, Legislator Data and Services, http://www.ncsl.org/programs/legismgt/about/legislator_overview.htm (last visited Sept. 16, 2007).

¹¹⁵ Gillette, *supra* note 84, at 1119.

¹¹⁶ See OR. REV. STAT. ANN. § 433.863 (West 2003); see also *Panel OKs Bill To Prohibit Outlawing Smoking in Bars*, OREGONIAN, Apr. 17, 2001, at B7. Six years later, the Oregon legislature passed a statewide smoking ban similar to those previously enacted by the three cities – Corvallis, Eugene, and Philomath. Dave Hogan & Ryan Kost, *Oregon Makes Bars Smoke-Free*, OREGONIAN, June 16, 2007, at A1.

¹¹⁷ See LA. REV. STAT. ANN. § 23:642 (1998); Minimum Wage: Louisiana Bill Barring Local Increase in Minimum Wage Awaits Governor's OK, 113 Daily Lab. Rep. (BNA) A-2 (June 12, 1997) (noting that "the bill was pushed by key business groups, such as the Louisiana Restaurant Association and the New Orleans Chamber of Commerce").

successfully lobbied state legislatures to expressly preempt local rent control ordinances.¹¹⁸

Nonetheless, despite their frequent success at securing express legislative bailouts from local regulation, businesses also frequently turn to the courts to overturn local regulations they dislike, either after they have tried and failed to lobby the state legislature for a bailout or while they are lobbying the state legislature.¹¹⁹ This phenomenon is not surprising, for as Professor Einer Elhauge has explained, interest groups – particularly those with extensive resources – will spend time and money on whatever methods of influencing public policy are available.¹²⁰ Because most state courts have embraced a jurisprudence of implied intrastate preemption that gives opponents of a particular local ordinance at least a fighting chance of getting it invalidated, it is logical for such opponents – particularly, business and industry groups – to look to the courts, in addition to or instead of the state legislature, for relief.

B. *Intrastate Implied Preemption Doctrine*

Having framed judicial preemption – particularly, implied preemption – within its larger political context, it is useful to look at the doctrine courts employ when deciding such claims. Despite some superficial distinctions, most states' preemption analyses are similar in form to the federal model.¹²¹

¹¹⁸ At least four states – Arizona, Colorado, Massachusetts, and Oregon – have legislation that expressly preempts local rent control ordinances. *See* ARIZ. REV. STAT. ANN. § 33-1329 (2007); COLO. REV. STAT. ANN. § 38-12-301 (West 2006); MASS. GEN. LAWS. ch. 40P, § 5 (2006); OR. REV. STAT. ANN. § 91.225 (West 2003). State legislatures in other states – namely, New York and California – have passed legislation aimed at weakening local rent control laws. *See California Begins Easing Its Once-Strict Laws on Rent Control*, N.Y. TIMES, Dec. 31, 1995, at A21.

¹¹⁹ *See Goodell v. Humboldt County*, 575 N.W.2d 486, 489 (Iowa 1998) (discussed *infra* Part II.B.1) (considering claim of hog farmers seeking a ruling of implied preemption from Iowa's courts while at the same time pursuing express preemption of the county ordinance from the Iowa legislature).

¹²⁰ Elhauge, *supra* note 74, at 49.

¹²¹ There are, as might be expected, notable differences in some states. The Oregon Supreme Court, due to the unique wording of the Oregon constitution's home rule amendment, OR. CONST. art. XI, § 2 ("The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon . . ."), presumes that the state legislature intended to preempt cities in the criminal field but applies the opposite presumption in the civil context. *See State v. Tyler*, 7 P.3d 624, 627 (Or. Ct. App. 2000). Kansas has a complicated constitutional provision that allows cities to exempt themselves from preemption by certain state statutes provided that they do so through a "charter ordinance," which is more difficult to enact than a non-charter ordinance. *See* KAN. CONST. art. XII, § 5(b). Georgia's constitution contains a tortuously worded "uniformity clause" which prohibits local laws "in any case for which provision has been made by an existing general law," except that the state legislature may "authorize local governments by local ordinance or resolution to

Because the federal categories of implied preemption are likely familiar to most readers, they provide a useful starting point for discussing intrastate preemption. Generally speaking, federal implied preemption contains two main subcategories, “conflict” and “field” preemption. “Conflict” preemption asks whether a particular state enactment somehow contradicts the dictates of federal law. “Conflict” preemption breaks down into two subcategories of its own: “physical impossibility” – where compliance with both the state and federal directives is mutually exclusive – and “obstacle” preemption – where state law stands as an impediment to the accomplishment of an objective of federal law.¹²² “Occupation of the field,” on the other hand, is said to occur when “Congress’ intent to supersede state law may be found from a ‘scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.’”¹²³ Although discerning Congress’s intent is supposed to be central to “field” preemption,¹²⁴ the Supreme Court has decreed that this analysis may also be informed by the importance of the federal interest or the potentially duplicative nature of the state regulation.¹²⁵ While “conflict” and “field” preemption constitute discrete categories in theory, the Supreme Court and legal commentators have recognized that, in practice, the distinction between the two categories often blurs, as does the distinction between express and implied preemption.¹²⁶

Only one state, Utah, has formally embraced the federal preemption taxonomy for its doctrine of intrastate preemption.¹²⁷ Nonetheless, all but one state – Illinois – recognize some form of implied preemption.¹²⁸ Most states subdivide implied preemption into categories similar to those used by the United States Supreme Court – “conflict” and “field.”¹²⁹ In the realm of

exercise police powers which do not conflict with general laws.” GA. CONST. art. III, § VI, ¶ IV(a).

¹²² *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (1983).

¹²³ *Id.* at 203-04.

¹²⁴ *See FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990).

¹²⁵ *Pacific Gas & Elec. Co.*, 461 U.S. at 204; *see also U.S. v. Locke*, 529 U.S. 89, 116 (2000).

¹²⁶ *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990); *see also French v. Pan Am Express, Inc.*, 869 F.2d 1, 2 (1st Cir. 1989).

¹²⁷ *See Summit Water Distrib. Co. v. Mountain Reg’l Water Special Servs. Dist.*, 108 P.3d 119, 122 (Utah Ct. App. 2005).

¹²⁸ *See infra* note 216 and accompanying text (discussing Illinois’s unique approach to preemption).

¹²⁹ Some states use “preemption” to refer only to express preemption and the intrastate equivalent of federal “field” preemption, treating “conflict” as a separate category from, rather than as a subcategory of, preemption. Minnesota is a leading state in this regard. *See, e.g., Mangold Midwest Co. v. City of Richfield*, 143 N.W.2d 813, 819 (Minn. 1966); *N. States Power Co. v. City of Granite Falls*, 463 N.W.2d 541, 543 (Minn. Ct. App. 1990); *see*

conflict, many states purport to apply an approach similar to federal obstacle preemption,¹³⁰ asking whether a local ordinance substantially interferes with state law or the state's constitutional responsibilities.¹³¹ As I will explain in Part III, substantial interference, coupled with an assessment of the nature of the local action, should be the primary focus of a state court applying implied preemption.

1. "Prohibit/Permit" and "More Stringent"

Unfortunately, under the rubric of conflict preemption, many state courts either supplement their focus on substantial interference or supplant it altogether with a distorted version of the "physical impossibility" test that asks whether a local ordinance "permits an act prohibited by a statute or prohibits an act permitted by a statute."¹³² The latter half of this formulation, which I will refer to as the "prohibit/permit" test, is a fundamentally flawed approach that creates tremendous confusion for courts and litigants. "Prohibit/permit," in its most extreme form, is an argument almost shocking in its sophistic simplicity; nonetheless, litigants challenging local ordinances frequently rely upon it. The argument proceeds as follows: state law, or lack thereof, sets a regulatory floor, and any activity above that floor is permitted by state law and may not be regulated. For instance, assume that state law is silent on the issue

also Phantom of Clearwater, Inc. v. Pinellas County, 894 So. 2d 1011, 1015 (Fla. Dist. Ct. App. 2005). This distinction is little more than semantic.

¹³⁰ See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (striking down a Pennsylvania law as preempted in part because it "st[ood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); *Gibbons v. Ogden*, 22 U.S. 1, 210 (1824) (explaining that New York law was preempted when it "c[a]me into collision with an act of Congress").

¹³¹ See, e.g., *Sch. Comm. v. Town of York*, 626 A.2d 935, 939 (Me. 1993) (stating that preemption occurs where "the municipal ordinance in question would frustrate the purpose of any state law" (quoting ME. REV. STAT. ANN. tit. 30-A § 3001 (1996))); see also *Hill v. Tschannen*, 590 S.E.2d 133, 135 (Ga. Ct. App. 2003) (finding local ordinance preempted because it "would hinder operation of the state law rather than augment or strengthen it").

¹³² *Goodell v. Humboldt County*, 575 N.W.2d 486, 493 (Iowa 1998); see also 5 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 15:18, at 156-57 (3d ed., rev. vol. 2004 & Supp. 2006) ("[T]hat which is allowed by the general laws of the state cannot be prohibited by ordinance Conversely . . . an ordinance cannot authorize what the statutes forbid."). "Permit/prohibit" and "prohibit/permit" and their equivalents are used by a large number of states and are routinely cited in implied preemption cases. See, e.g., *Alabama Disposal Solutions-Landfill, L.L.C. v. Town of Lowdensboro*, 837 So. 2d 292, 301 (Ala. Civ. App. 2002); *City of Commerce City v. State*, 40 P.3d 1273, 1284 (Colo. 2002); *State v. Ewing*, 914 P.2d 549, 554 (Haw. Ct. App. 1996); *Allied Vending, Inc. v. City of Bowie*, 631 A.2d 77, 86 n.12 (Md. 1993); *AFSCME v. City of Detroit*, 662 N.W.2d 695 (Mich. 2003); *Page W., Inc. v. Cmty. Fire Prot. Dist.*, 636 S.W.2d 65, 67 (Mo. 1982); *State v. Salisbury*, 579 N.W.2d 570, 574 (Neb. Ct. App. 1998); *Vill. of Struthers v. Sokol*, 140 N.E. 519, 521 (Ohio 1923); *State v. Tyler*, 7 P.3d 624, 627 (Or. Ct. App. 2000); *City of Tacoma v. Luvane*, 827 P.2d 1374, 1378-79 (Wash. 1992).

of smoking in public places such as bars and restaurants. State law is said to “permit” smoking in all such places, at least insofar as it does not ban it. By banning smoking in bars and restaurants, the argument goes, a city prohibits something permitted by state law, and such a regulation is, therefore, invalid. Taken to its extreme, “prohibit/permit” would nearly eviscerate cities’ home-rule authority, insofar as city ordinances generally build upon a pre-existing tableau of state law that necessarily permits all that it does not prohibit.¹³³

Despite its obvious flaws, state courts routinely recite the “prohibit/permit” test as one of the touchstones of their preemption analysis.¹³⁴ Not surprisingly, businesses have seized upon this language and attempted to use it to overturn local ordinances in a wide variety of areas, including: smoking bans,¹³⁵ measures restricting cigarette vending machines to areas not accessible to minors,¹³⁶ cigarette advertising restrictions,¹³⁷ rent control ordinances,¹³⁸ local minimum wage increases,¹³⁹ anti-discrimination ordinances protecting groups not protected by state law such as gays and lesbians,¹⁴⁰ billboard restrictions,¹⁴¹ fireworks regulation,¹⁴² alcohol sale restrictions,¹⁴³ environmental measures,¹⁴⁴

¹³³ See *infra* note 160-61 and accompanying text.

¹³⁴ See *supra* note 132.

¹³⁵ *Modern Cigarette, Inc. v. Town of Orange*, 774 A.2d 969, 976 (Conn. 2001); *Lexington Fayette County Food & Beverage Ass’n. v. Lexington Fayette Urban County Gov’t*, 131 S.W.3d 745, 748 (Ky. 2004); *Tri-Nel Mgmt., Inc. v. Bd. of Health*, 741 N.E.2d 37, 40 (Mass. 2001); *Amico’s, Inc. v. Mattos*, 789 A.2d 899, 901 (R.I. 2002).

¹³⁶ *Allied Vending Inc. v. City of Bowie*, 631 A.2d 77, 78 (Md. 1993); *Take Five Vending, Ltd. v. Town of Provincetown*, 615 N.E.2d 576, 578 (Mass. 1993); *C.I.C. Corp. v. Twp. of E. Brunswick*, 628 A.2d 753, 754 (N.J. Super. Ct. App. Div. 1993); *Vatore v. Comm’r of Consumer Affairs*, 634 N.E.2d 958 (N.Y. 1994).

¹³⁷ *Penn Adver., Inc. v. Mayor of Baltimore*, 862 F. Supp. 1402, 1404 (D. Md. 1994) (applying Maryland state law).

¹³⁸ *Wagner v. Mayor of Newark*, 132 A.2d 794, 796-97 (N.J. 1957).

¹³⁹ *City of Baltimore v. Sitnick*, 255 A.2d 376, 376-77 (Md. 1969); *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1155 (N.M. Ct. App. 2005).

¹⁴⁰ *S.D. Myers, Inc. v. City & County of San Francisco*, 336 F.3d 1174, 1180 (9th Cir. 2003) (applying California state law); *Hartman v. City of Allentown*, 880 A.2d 737, 741 (Pa. Commw. Ct. 2005); *Anchor Sav. & Loan Ass’n v. Equal Opportunities Comm’n*, 355 N.W.2d 234, 240 (Wis. 1984).

¹⁴¹ *E.B. Elliott Adver. Co. v. Metro. Dade County*, 425 F.2d 1141, 1176 (5th Cir. 1970) (applying Florida state law).

¹⁴² *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1013 (Fla. Dist. Ct. App. 2005); *Brown v. City of Yakima*, 807 P.2d 353, 356 (Wash. 1991).

¹⁴³ *Lansdown Entm’t Corp. v. New York City Dep’t of Consumer Affairs*, 543 N.E.2d 725, 725 (N.Y. 1989); *Denene, Inc. v. City of Charleston*, 574 S.E.2d 196, 198 (S.C. 2003); *Town of Hilton Head Island v. Fine Liquors, Ltd.*, 397 S.E.2d 662, 663 (S.C. 1990).

¹⁴⁴ *Rhode Island Cogeneration Assocs. v. City of E. Providence*, 728 F. Supp. 828, 839 (D.R.I. 1990) (applying Rhode Island state law); *Franklin County v. Fieldale Farms Corp.*, (Ga. 1998); *Envirosafe Servs. of Idaho, Inc. v. Owyhee County*, 735 P.2d 998, 1004 (Idaho

restrictions on the sale of aerosol paint,¹⁴⁵ blue laws,¹⁴⁶ and regulations concerning the conversion of rental apartment units into condominiums.¹⁴⁷

On occasion, businesses succeed in convincing courts of their proposed application of the “prohibit/permit” test. For instance, in *Goodell v. Humboldt County*,¹⁴⁸ in a majority opinion that spawned two strong dissents, the Iowa Supreme Court sided with owners of large hog-confinement facilities who challenged a county’s regulations of such facilities that went beyond those of state law.¹⁴⁹ The county included permitting requirements, as well as groundwater protection measures and air quality protection regulations.¹⁵⁰ The court concluded that by regulating certain conduct that was previously unregulated under state law, the county had prohibited that which was previously permitted under state law, and the ordinances were invalid.¹⁵¹ In another decision applying the “prohibit/permit” test, the Missouri Supreme Court struck down a local ordinance requiring gasoline stations to provide full service to customers when state law allowed for self service.¹⁵² While the

1987); *Goodell v. Humboldt County*, 575 N.W.2d 486, 489 (Iowa 1998); *Cent. Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189, 1190 (Me. 1990); *Holiday Point Marina Partners v. Anne Arundel County*, 707 A.2d 829, 839 (Md. 1998); *Talbot County v. Skipper*, 620 A.2d 880, 880 (Md. 1993); *Blue Earth County Pork Producers v. County of Blue Earth*, 558 N.W.2d 25, 30 (Minn. Ct. App. 1997); *N. States Power Co. v. City of Granite Falls*, 463 N.W.2d 541, 546 (Minn. Ct. App. 1993); *Jancyn Mfg. v. County of Suffolk*, 518 N.E.2d 903, 903 (N.Y. 1987); *Weden v. San Juan County*, 958 P.2d 273, 734 (Wash. 1998).

¹⁴⁵ *Sherwin-Williams Co. v. City of Los Angeles*, 844 P.2d 534, 545 (Cal. 1993).

¹⁴⁶ *Boyle v. Campbell*, 450 S.W.2d 265, 266 (Ky. Ct. App. 1970); *Mangold Midwest Co. v. Vill. of Richfield*, 143 N.W.2d 813, 819 (Minn. 1966); *Power v. Nordstrom*, 184 N.W. 967, 969 (Minn. 1921).

¹⁴⁷ *Richardson v. City & County of Honolulu*, 868 P.2d 1193, 1223 (Haw. 1994); *Grace v. Town of Brookline*, 399 N.E.2d 1038, 1039 (Mass. 1979); *Plaza Joint Venture v. City of Atlantic City*, 416 A.2d 71, 73 (N.J. Super Ct. App. Div. 1980).

¹⁴⁸ 575 N.W.2d 486.

¹⁴⁹ *Id.* at 509, 511.

¹⁵⁰ *Id.* at 489-90.

¹⁵¹ The *Goodell* litigation involved four county ordinances. The Iowa Supreme Court struck down two of these – an ordinance requiring large livestock confinement facilities to be bonded or carry insurance sufficient to pay for environmental cleanup and remediation and an ordinance restricting toxic air emissions – as impliedly preempted due to conflict. *See id.* at 504, 506. The court invalidated the groundwater protection ordinance on the grounds that the state legislature had either expressly preempted localities on this issue or had occupied the field. *Id.* at 505.

¹⁵² *Page W., Inc. v. Cmty. Fire Prot. Dist.*, 636 S.W.2d 65, 68 (Mo. 1982). The local government at issue was neither a town nor a county, but rather a special-purpose government: a “fire protection district.” For more on special-purpose local governments, see BRIFFAULT & REYNOLDS, *supra* note 4, at 11-14.

locality argued that this measure, presumably adopted for safety reasons,¹⁵³ only added to state law without actually conflicting with it, the Missouri Supreme Court disagreed, holding that the measure prohibited conduct permitted by state law.¹⁵⁴ A lower Missouri court similarly applied the “prohibit/permit” test to invalidate a St. Louis ordinance increasing the minimum wage for employees of certain city contractors.¹⁵⁵

While they sometimes succeed in their “prohibit/permit” arguments, businesses also fail, usually because courts decide that the “prohibit/permit” test has been trumped by an offsetting, contradictory test: that cities are free to enact regulations that are more, but not less, stringent than state law.¹⁵⁶ This alternative approach allows courts to escape the anti-local conclusions to which the “prohibit/permit” test can lead ineluctably. For instance, in a recent decision concerning Santa Fe’s citywide minimum wage increase,¹⁵⁷ the New Mexico Court of Appeals rejected the implied preemption claim asserted by a coalition of Santa Fe businesses.¹⁵⁸ The businesses argued that the ordinance prohibited an act permitted by state law – namely, paying workers less than the Santa Fe minimum wage but as much as or more than the wage required by state law.¹⁵⁹ Under the logic of “prohibit/permit,” the businesses’ claim might have succeeded because New Mexico state law permitted paying wages prohibited by city ordinance in certain instances. Recognizing that under such an approach, however, “municipalities would effectively lose much of their ability to regulate,” the court rejected a “mechanical[]” or “wooden”

¹⁵³ The court’s opinion does not explain why the Community Fire Protection District banned self service, but those jurisdictions that require full service at gas stations – Oregon and New Jersey – generally cite safety as the primary reason. See Andrea Kannapell, *Government: With Proposed Gas-Tax Boost, a New Push for Self-Service*, N.Y. TIMES, May 31, 1998, at NJ14. Moreover, as the district’s full name indicates, its *raison d’être* was “fire protection,” so it seems reasonable to assume that the full-service requirement was adopted for reasons related to fire prevention and other safety concerns.

¹⁵⁴ *Page W.*, 636 S.W.2d at 68.

¹⁵⁵ See *Missouri Court Strikes Down St. Louis Living Wage Ordinance*, 146 Daily Lab. Rep. AA-1 (July 31, 2001) (summarizing unpublished opinion of Missouri Circuit Court in *Missouri Hotel & Motel Ass’n v. City of St. Louis*, No. 004-02638, 7 Wage & Hour Cas. 2d (BNA) 218 (Mo. Cir. Ct. 2001), which struck down the St. Louis living wage ordinance because “it prohibits what the [state] minimum wage statute permits, i.e., payment of a different wage”).

¹⁵⁶ See, e.g., *City of Tucson v. Consumers for Retail Choice*, 5 P.3d 934, 937 (Ariz. Ct. App. 2000); *Modern Cigarette, Inc. v. Town of Orange*, 774 A.2d 969, 983-84 (Conn. 2001).

¹⁵⁷ Specifically, the ordinance applied to businesses registered or licensed in Santa Fe that employed twenty-five or more workers. SANTA FE, N.M., CITY CODE, ch. XXVIII, § 1.5(A)(4), (C) (2003), available at <http://www.santafenm.gov/cityclerks/Ordinances.asp>.

¹⁵⁸ *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1155 (N.M. Ct. App. 2005).

¹⁵⁹ *Id.* at 1165.

application of the “prohibit/permit” test and opted for allowing ordinances “more strict than state law.”¹⁶⁰ Like the New Mexico Court of Appeals, some other state courts have recognized that a robust application of “prohibit/permit” can lead to absurd results and have opted instead to use the “more stringent” test more frequently.¹⁶¹ Under this approach, a city ordinance is valid so long as it is “more stringent” than state law, but invalid if it is less so. In many instances similar to the one confronted by the New Mexico Court of Appeals, the “more stringent” rule and “prohibit/permit” lead to opposite results. This inconsistency is one prominent reason why the implied preemption doctrine has been described as confused and confusing.¹⁶²

One might explain the seeming inconsistency between the “prohibit/permit” and “more stringent” tests by pointing to Karl Llewellyn’s famous observation that for every canon of construction, “there is another canon that suggests the opposite outcome.”¹⁶³ Llewellyn explained that a court’s use of canons, while cloaked in the garb of judicial restraint, actually enhances rather than constrains judicial power because the canons provide a seemingly respectable explanation for the result a court has reached for other, unarticulated reasons.¹⁶⁴ State courts’ seemingly inconsistent use of “prohibit/permit” and “more stringent,” therefore, may mask a larger hidden policy agenda. If that is so, I have not discerned a single “grand” scheme, although in Part III, I will explain that courts have sometimes used these tests selectively to ensure that cities are not behaving parochially.¹⁶⁵

One might contend that the only problem with the “prohibit/permit” or “more stringent” approach is that the tests are used inconsistently. If courts consistently applied one of the two tests, regardless of which one they picked, courts would provide the state legislature and cities with a clear “default rule” to guide them.¹⁶⁶ If, for instance, “more stringent” were the consistent default rule, the legislature would know that unless it specifically prohibited local governments from passing a smoking ban, merely banning smoking in restaurants (but not bars) would be deemed legislative permission for local governments to ban smoking in bars. Conversely, if “prohibit/permit” were the

¹⁶⁰ *Id.*

¹⁶¹ *See, e.g.,* New York State Club Ass’n v. City of New York, 505 N.E.2d 915, 920 (N.Y. 1987) (stating that if robust prohibit/permit “were the rule, the power of local governments to regulate would be illusory”).

¹⁶² *See supra* note 12.

¹⁶³ Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401 (1950); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 264 (1986).

¹⁶⁴ Llewellyn, *supra* note 163, at 398; Macey, *supra* note 163, at 264.

¹⁶⁵ *See infra* notes 298-309 and accompanying text.

¹⁶⁶ *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2142, 2157 (2002); *see also* McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 716 (1992).

consistent default rule, the legislature would know that by banning smoking in restaurants only, courts would deem that the legislature had impliedly “permitted” smoking in bars, thereby forbidding localities from regulating further. According to default-rule theorists, it should matter little whether courts choose “prohibit/permit” or “more stringent” as a default rule, so long as they consistently apply one test and allow the legislature to anticipate the implications of its legislation – or lack thereof – on a particular matter.¹⁶⁷

While superficially attractive, the default-rule theory of statutory interpretation has serious flaws. Even if default rules of statutory interpretation are consistently applied by courts, which itself is unlikely,¹⁶⁸ the legislature frequently is unaware of or apathetic about the rules and their effect on statutes. Judge Abner Mikva noted that when he was in Congress, “the only ‘canons’ we talked about were the ones the Pentagon bought that could not shoot straight;”¹⁶⁹ it is likely that state legislators are at least as unaware of or indifferent to canons as their federal counterparts.¹⁷⁰ If we assume that a legitimate theory of statutory interpretation should be concerned with legislative “intent” or “purpose” to at least some degree,¹⁷¹ then the default-rule theory of statutory interpretation requires courts to attribute to the passage or non-passage of statutes a meaning that may be far removed from that of a legislature indifferent to the canons that courts would apply. Further, legislators often prefer ambiguity rather than the certainty offered by a consistently applied default rule because such ambiguity allows for a greater degree of compromise among the members of the coalition necessary to the legislation’s passage.¹⁷² Legislative ambiguity is also frequently an intentional recognition of the limitations of the legislative process by the legislature itself. Legislation is necessarily forward-looking and cannot anticipate the circumstances that may arise years ahead concerning a particular application of legislation. Rigid application of default rules constrains the ability of courts to respond to new and unanticipated sets of facts when interpreting a statute, even

¹⁶⁷ Rosenkranz, *supra* note 166, at 2142; *see also* McNollgast, *supra* note 166, at 716.

¹⁶⁸ Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 682-83 (2002).

¹⁶⁹ Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 629 (1987).

¹⁷⁰ *See infra* text accompanying notes 174-176.

¹⁷¹ This is by no means an uncontroversial proposition. Many scholars have ridiculed the idea that discerning legislative “intent” is a worthwhile judicial endeavor, and they have also criticized the search for the related concept of a legislative “purpose.” *See, e.g.*, Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 875 (1930); *see also* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 426-29 (1989) (discussing the problems inherent in seeking to discover legislative purpose or intent and concluding that “[p]urposive interpretation . . . is far from a panacea”).

¹⁷² Rosenkranz, *supra* note 166, at 2155; *see* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 20-21 (1997).

though it is likely that the enacting legislature, in recognition of its inability to predict the future, may have intended to give courts significant flexibility.¹⁷³

Hard-and-fast default rules are likely even more problematic at the state level than at the federal level because state legislatures, on the whole, are less-professional lawmaking bodies, with newer and more inexperienced lawmakers who often work only part-time rather than full-time and have smaller professional staffs.¹⁷⁴ State legislatures also meet less frequently and for shorter periods of time than Congress, with some legislatures meeting only every other year.¹⁷⁵ These characteristics make it even more likely that state legislatures will be oblivious to how their statutes are being interpreted by the courts, thereby rendering the consistent judicial enforcement of default rules less effective as a means of eliciting legislative intent or purpose.¹⁷⁶

In addition to the problems common to all default rules, neither “prohibit/permit” nor “more stringent” offers a particularly attractive default rule, although the latter is the more palatable of the two. As a default rule, “prohibit/permit” places inertia on the side of no local experimentation, requiring an affirmative act of the legislature to overcome the default presumption that, for example, a state’s establishment of a minimum wage is intended to prohibit a locality from establishing a higher minimum wage. Legislative inertia is a strong force,¹⁷⁷ and “prohibit/permit” pits local autonomy against this inertia, requiring the advocates of municipal power generally, and the advocates of a particular exercise of municipal power – such as raising the local minimum wage – to petition the legislature for this additional power. In essence, “prohibit/permit” as a default rule for the allocation of power between states and cities would amount to an effective

¹⁷³ See WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 123-28 (1994); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 56-57, 62 (1994).

¹⁷⁴ See John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1228 (1993). As of 2003, there were a total of 34,979 state legislative staff members, for an average of 700 per state, or 5 per legislator. National Conference of State Legislatures, *Legislator Data and Services*, <http://www.ncsl.org/programs/legismgt/about/staffcount2003.htm> (last visited Oct. 8, 2007). Congress, by contrast, has approximately 30,000 professional staff members, or 56 per voting member. See Russell Chapin, Chadha, Garcia, and the Dormant Commerce Clause Limitation on State Authority to Regulate, 23 URB. LAW. 163, 180 (1991).

¹⁷⁵ See *infra* note 265.

¹⁷⁶ See Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 659-60 (1999) (explaining that judicial formalism works better in England than in America because Parliament uses a “highly professional” office of skilled legal authors to draft its laws).

¹⁷⁷ See ESKRIDGE, *supra* note 173, at 251; Sunstein, *supra* note 176, at 649 (“[I]n statutory interpretation, as in contract law, the default rule may have an ‘endowment effect’ and thus tend to stick.”).

restoration of Dillon's Rule, which required cities to petition the state legislature for any power beyond the most rudimentary.¹⁷⁸

Moreover, "prohibit/permit" as a default rule would require the advocates of new city policies to expend significant resources to secure legislative authority for each new initiative. Such a rule would benefit the well-organized and well-funded business groups that oppose many local regulations. Professor Elhauge has argued that courts should use "preference-eliciting default rules" in interpreting ambiguous statutes where one or more interest groups arguing for a particular interpretation are likely to have more influence over the legislative process than opponents of that interpretation.¹⁷⁹ So long as any interim costs of an erroneous interpretation are acceptable, Elhauge argues that courts should construe the ambiguous statute in a manner adverse to the better-organized and more influential interest groups so as to force those groups to go to the legislature and ask for a statutory override of the judicial interpretation.¹⁸⁰ This approach, Elhauge contends, "tests" the power of the stronger interest group and forces the legislature to be more explicit about its desires.¹⁸¹ Applying Elhauge's theory, Rick Hills has argued that at the federal level the default rule should be set *against* preemption, precisely to force the better-funded and organized business lobby to turn to the legislature for relief from state legislation it dislikes.¹⁸² Hills argues that this approach will not only more accurately assess legislative intent, as per Elhauge, but that it will force Congress to confront substantive issues that state legislatures – "political entrepreneurs," as Hills calls them – have put on the agenda. A state's initial foray into a particular area of policy can valuably inform the national political debate and exert pressure on federal politicians to take action in that area.¹⁸³

Insofar as it counsels against adopting "prohibit/permit" as a default rule, Hills's argument applies with equal, if not greater, force at the state level.

¹⁷⁸ See *supra* text accompanying notes 43-48; see also *Goodell v. Humboldt County*, 575 N.W.2d 486, 517 (Iowa 1998) (Snell, J., dissenting) (accusing the majority of possibly "excavat[ing]" "the Dillon Rule... from the grave" by applying an aggressive "prohibit/permit" test).

¹⁷⁹ Elhauge, *supra* note 107, at 2207, 2209.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 2209.

¹⁸² Hills, *supra* note 73, at 4, 20-22. Interestingly, despite his explicit reliance on Elhauge's work, Hills's application of Elhauge's "preference-eliciting default rule" to federal-state preemption actually conflicts with Elhauge's views on the subject. While Hills argues for a "clear-statement" default rule against preemption due to the business lobby's superior access to Congress, see *id.* at 17-18, 25, Elhauge thinks that no such rule is necessary because states have an "unusually strong, not weak, access to the congressional agenda," Elhauge, *supra* note 107, at 2250.

¹⁸³ Similarly, Professor Candice Hoke has argued that implied preemption "undermines democratic accountability and public decision-making at the national level, as well as the democratic process and regulatory space of states and localities." S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 716 (1991).

Adopting “prohibit/permit” as a default rule would make it easier for state legislators to avoid addressing policy matters – such as antismoking regulations or an increase in the minimum wage – that cities, exercising their home rule authority, have put at the forefront of the public policy consciousness. If “prohibit/permit” were the rule, state legislators could rely on the courts to invalidate local initiatives that “prohibited” something previously “permitted” by state law. A doctrine of implied preemption less rigid than “prohibit/permit,” on the other hand, would often require businesses to seek relief from local regulation from the legislature rather than the courts, thereby at least spurring debate over a potentially important topic that the legislature might have avoided had cities not addressed first. Moreover, in light of the organizational strength that businesses as an interest group are likely to possess, they generally should not be the beneficiaries of a default rule, like “prohibit/permit,” that places legislative inertia on their side.

Another problem with the “prohibit/permit” test is the ambiguity laden in the word “permit.” As the Oregon Supreme Court has observed, “what the legislature ‘permits’ can range from express permissive terms to total inattention and indifference to a subject.”¹⁸⁴ Some courts apply the “prohibit/permit” test in a way that takes a very expansive view of legislative “permission”: merely not banning something while banning something else – e.g., banning smoking in restaurants but not bars – is seen as permission for the latter activity.¹⁸⁵ This form of the “prohibit/permit” test is particularly problematic in that it ascribes legislative intent or purpose to what is more of an omission than an act.¹⁸⁶ By merely addressing one activity and not others in a particular “field,” the legislature is deemed to “permit” the activities it has not prohibited, much like a legislature’s initial foray into a field is sometimes considered to have completely “occupied” it, thereby prohibiting additional local regulation. I will address “occupation of the field” in more depth below, but an aggressively anti-localist application of “prohibit/permit” is quite similar to an aggressively anti-localist application of “occupation of the field.”

Some states have helpfully refined their “prohibit/permit” tests so as to make clear that legislative silence on a matter does not necessarily amount to “permission.” Rather, if the state legislature intends to permit an activity across the state in a way that provides immunity from municipal regulation, this intention must be made clear through express language. Thus, Minnesota

¹⁸⁴ *City of Portland v. Lodi*, 782 P.2d 415, 417 (Or. 1989).

¹⁸⁵ Such an approach is conceptually akin to the “*expressio unius*” or “*inclusio unius*” canon of statutory construction. For examples of opinions taking such an expansive approach to the “permit” part of “prohibit/permit,” see *supra* notes 149-155 and accompanying text; see also *Junction City v. Lee*, 532 P.2d 1292, 1301 (Kan. 1975) (Schroeder, J., dissenting); *Miller v. Fabius Twp. Bd.*, 114 N.W.2d 205, 209-10 (Mich. 1950) (Souris, J., dissenting); *Amico’s Inc. v. Mattos*, 789 A.2d 899, 913 (R.I. 2002) (Goldberg, J., concurring and dissenting); *Weden v. San Juan County*, 958 P.2d 273, 293-95 (Wash. 1998) (Sanders, J., dissenting).

¹⁸⁶ See Farber, *supra* note 8, at 396 n.8.

and New York require that for an ordinance to be invalid, it must forbid what a statute “expressly” or “specifically” permits.¹⁸⁷ By limiting “prohibit/permit” to the realm of “specific” or “express” permission, Minnesota and New York effectively collapse “prohibit/permit” into the less controversial category of express preemption.¹⁸⁸ By requiring express permission for a particular activity to insulate it from local regulation, these states force groups with superior organization and political influence to appeal to the legislature for such protection. The Minnesota and New York versions of “prohibit/permit” thus do not suppress political entrepreneurship or local policy experimentation as other states’ versions of “prohibit/permit” do.

For all of the above reasons, state courts would do well to abandon – or at least refine – the “prohibit/permit” test for determining whether implied conflict preemption has occurred.¹⁸⁹ While “more stringent” would operate as

¹⁸⁷ *Blue Earth County Pork Producers v. County of Blue Earth*, 558 N.W.2d 25, 30 (Minn. Ct. App. 1997); *Jancyn Mfg. Corp. v. County of Suffolk*, 518 N.E.2d 903, 907-08 (N.Y. 1987).

¹⁸⁸ See *supra* notes 8, 126.

¹⁸⁹ As opposed to the “prohibit/permit” inquiry, asking whether a city ordinance permits that which state law prohibits – “permit/prohibit” – is generally merely superfluous rather than restrictive or local autonomy. On the surface, asking whether a local law permits something that state law prohibits might seem eminently reasonable. After all, if the state sets a mandatory statewide speed limit of 70 miles per hour, then a local ordinance adopting a speed limit of 75 miles per hour would seem to permit a driver to do exactly what state law has prohibited: drive at a speed greater than 70 miles per hour. Even in this simple example, however, “permit/prohibit” is unnecessary because it does not identify any meaningful conflict between the hypothetical ordinance and statute. If a driver speeds along at 71 miles per hour, he is still in violation of state law, regardless of what the municipal ordinance says. The municipal ordinance’s allowance of 5 extra miles per hour provides no safe harbor from the state speeding prohibition (assuming that this hypothetical city is not in an imperio state in which speed limits are considered a matter of “local” concern). In this sense, the local ordinance’s allowance of 5 extra miles per hour operates much as the “medical marijuana” statutes passed by states operate vis-à-vis the federal government: duly registered users of “medical marijuana” remain at risk of prosecution under federal drug laws by federal authorities even if they are effectively immunized from prosecution under state law. See *Gonzales v. Raich*, 545 U.S. 1, 29 (2005).

If we change the hypothetical so that the local ordinance sets 71 miles per hour as the *minimum* speed at which to drive through town, then there would likely be a conflict. In this more extreme hypothetical, local law *requires*, rather than permits, something that state law prohibits, and, therefore, a conclusion of preemption would be appropriate, given the havoc these contradictory directives might wreak on drivers in this particular hypothetical town. Cases where an ordinance requires something that a state statute prohibits, or vice versa, are rare. When such cases occur, they usually involve direct, obvious conflict between local and state law. See *infra* notes 276-280 and accompanying text. Sometimes such cases might more properly be characterized as express preemption rather than involving “permit/prohibit.” See, e.g., *Gentzler Tool & Die Corp. v. Green*, 681 N.E.2d 467, 469 (Ohio Ct. App. 1996) (holding that a local ordinance requiring a three-fourths vote of the

a better default rule than “prohibit/permit” from the perspective of being less likely to suppress local innovation, “more stringent” suffers from flaws of its own in addition to the problems inherent in any default rule.¹⁹⁰ The “more stringent” test is simplistic and often incomplete because the question of whether a regulation is more or less stringent is necessarily relative to the subjects or persons regulated. Consider the circumstances presented by the South Dakota case of *Rantapaa v. Black Hills Chair Lift Co.*,¹⁹¹ in which the plaintiffs sued a ski slope operator after their minor ward suffered permanent brain injury due to an accident on the defendants’ slopes. The plaintiffs sued under state tort law, but the defendants relied on a county ordinance requiring skiers to assume legal responsibility for any of the dangers and risks of skiing.¹⁹² The South Dakota Supreme Court ultimately struck down the ordinance as conflicting with state law because state law allowed a cause of action for negligence, and the ordinance potentially forbade one.¹⁹³ With respect to ski slope operators, the county ordinance was less stringent because it freed them of legal liability to a greater degree than did state law, and, therefore, this case was decided correctly under the “more stringent” rule. However, with respect to skiers, the county ordinance was simply more stringent than state law, in that it reduced a skier’s chances of obtaining relief should an accident occur while skiing. Looking at this ordinance from the perspective of regulating skiers rather than ski slope operators, therefore, it would seem to pass the “more stringent” test.

*State v. Barsness*¹⁹⁴ provides another example of the “more stringent” test’s potential indeterminacy.¹⁹⁵ The defendant challenged his conviction for violating an Idaho law requiring drivers to yield to emergency vehicles. The emergency vehicle in question flashed its lights but failed to sound its siren. Under Idaho law, an emergency vehicle was required only to do either, but Boise city code required it to do both, and the alleged violation had occurred in

council to reject a recommendation of the planning and zoning commission conflicted with a state requirement of a simple majority vote). Assume, for example, the hypothetical state speeding law, whether through its express language or from clearly discernible legislative intent, is designed to be of statewide application. The law might be written as such: “The maximum speed limit in this state shall be 70 miles per hour.” Such a statement could plausibly be interpreted to mean that the state legislature expressly preempted localities from adopting a speed limit higher than 70 mph, even if it does not include language to the effect of “this statute preempts the authority of localities to adopt a higher speed limit.” See *supra* note 8 (discussing how the distinction between express and implied preemption is not always clear).

¹⁹⁰ See *supra* notes 168-176 and accompanying text.

¹⁹¹ 633 N.W.2d 196 (S.D. 2001).

¹⁹² *Id.* at 200-01.

¹⁹³ *Id.* at 204-05.

¹⁹⁴ 628 P.2d 1044 (Idaho 1981).

¹⁹⁵ *Id.* at 1045.

Boise.¹⁹⁶ A majority of the Idaho Supreme Court handily invalidated Boise's ordinance as invalidly conflicting with state law.¹⁹⁷ While the Boise City Code was more stringent with respect to emergency vehicle drivers, requiring them to display flashing lights *and* sound their sirens, it was less stringent with respect to drivers of all other vehicles, in that it did not require them to yield to emergency vehicles that only flashed lights *or* sounded sirens, whereas state law required them to yield in either instance. *Barsness*, like *Rantapaa*, demonstrates that the rather formalistic "more stringent" test can sometimes provide limited direction in preemption cases.

2. "Occupation of the Field"

In addition to "prohibit/permit," a frequent argument made by opponents of local ordinances is that a city has legislated in a field "fully occupied" by state law.¹⁹⁸ The more pervasively and thoroughly the legislature has regulated a field, the argument goes, the more likely it is that the state legislature "intended" to completely occupy that field and not allow for local regulation, even if the legislature never expressly declared such an intent.¹⁹⁹ Opponents of

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* A dissenting justice, however, argued that the Boise City Code was valid because it was simply more stringent than state law on the matter of what conduct was required of emergency vehicles. *Id.* at 1046-47 (Bistline, J., dissenting) (finding no conflict in the laws "because emergency vehicles may easily comply with both").

¹⁹⁸ *See, e.g.,* *City of Tucson v. Consumers for Retail Choice*, 5 P.3d 934, 937 (Ariz. Ct. App. 2000); *O'Connell v. Stockton*, 162 P.3d 583 (Cal. 2007); *Bd. of County Comm'rs of Douglas County v. Bainbridge, Inc.*, 929 P.2d 691, 709 (Colo. 1997); *Dempsey v. City of Denver*, 649 P.2d 726, 727-28 (Colo. Ct. App. 1982) (finding an intent to occupy the field of employee compensation); *Modern Cigarette v. Town of Orange*, 774 A.2d 969, 977-78 (Conn. 2001); *City of Buford v. Georgia Power Co.*, 581 S.E.2d 16, 17 (Ga. 2003); *Goodell v. Humboldt County*, 575 N.W.2d 486, 493 (Iowa 1998); *Sch. Comm. of York v. Town of York*, 626 A.2d 935, 939 (Me. 1993); *Allied Vending, Inc. v. City of Bowie*, 631 A.2d 77, 87 (Md. 1993); *Multnomah Kennel Club v. Dep't of Revenue*, 666 P.2d 1327, 1332 (Or. 1983); *Barnhill v. City of N. Myrtle Beach*, 511 S.E.2d 361, 363 n.2 (S.C. 1999); *Summit Water Distribution Co. v. Mountain Reg'l Water Special Servs. Dist.*, 108 P.3d 119, 123 (Utah Ct. App. 2005).

As in the case of conflict preemption, criminal defendants charged under local law frequently seek to argue for the local law's invalidation under occupation of the field. *See, e.g.,* *Horton v. Oakland*, 82 Cal. App. 4th 580 (2000), *overruled by O'Connell*, 162 P.3d at 590-92; *Pierce v. Commonwealth*, 777 S.W.2d 926, 928 (Ky. 1989); *People v. Llewellyn*, 257 N.W.2d 902, 903 (Mich. 1977). In a few states, such as North Carolina, criminal cases provide most of the grist for the implied preemption mill. *See* *Greene v. City of Winston-Salem*, 213 S.E.2d 231, 236 (N.C. 1975).

¹⁹⁹ *See, e.g.,* *City of Northglenn v. Ibarra*, 62 P.3d 151, 163 (Colo. 2003); *Hillsborough County v. Fla. Rest. Ass'n*, 603 So. 2d 587, 591 (Fla. Dist. Ct. App. 1992); *Anamizu v. City & County of Honolulu*, 481 P.2d 116, 118 (Haw. 1971); *Lexington Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban County Gov't*, 131 S.W.3d 745, 750 (Ky. 2004); *Talbot County v. Skipper*, 620 A.2d 880, 885 (Md. 1993); *People v. Llewellyn*, 257

local ordinances are sometimes successful when they argue “occupation of the field.” For instance, in *Allied Vending, Inc. v. City of Bowie*,²⁰⁰ the Maryland Court of Appeals considered a challenge by cigarette vending companies to local ordinances that confined cigarette vending machines to locations not generally accessible to minors when state law contained no such restrictions.²⁰¹ The court concluded that because the state licensed both cigarette retailers and cigarette vending machines, it had impliedly occupied the field of cigarette sales through vending machines, and therefore the local ordinances were invalid intrusions into this field.²⁰² The court reached this conclusion despite the lack of any express indication by the legislature of its intent to preempt cities from entering the field of cigarette vending machine regulation.²⁰³ In a way, the court’s approach in *Allied Vending* resembled a robust “prohibit/permit” test: the cities had prohibited something that state law permitted – cigarette vending machines in certain areas – and therefore their ordinances were invalid.²⁰⁴

Preemption by “occupation of the field” has been much criticized, particularly at the federal level, for being a naked judicial policy judgment unmoored from statutory text and legislative intent that snuffs out the states’ ability to regulate,²⁰⁵ prompting at least one scholar to call it the “new

N.W.2d 902, 907 (Mich. 1977); *Casico, Inc. v. City of Manchester*, 702 A.2d 302, 304 (N.H. 1997); *Plaza Joint Venture v. City of Atlantic City*, 416 A.2d 71, 77 (N.J. Super. Ct. App. Div. 1980); *DJL Rest. Corp. v. City of New York*, 749 N.E.2d 186 (N.Y. 2001); *Greene v. City of Winston-Salem*, 213 S.E.2d 231, 237 (N.C. 1975); *Duff v. Twp. of Northampton*, 532 A.2d 500, 504 (Pa. 1987); *Anchor Sav. & Loan Ass’n v. Equal Opportunities Comm’n*, 355 N.W.2d 234, 240 (Wis. 1984) (holding that local regulation is preempted where the State established “a comprehensive and all-encompassing scheme regarding savings and loan association practices”). Some state courts consider the duplicative nature of local ordinances as a factor in preemption analysis, particularly in the context of field preemption. *See, e.g., Sherwin-Williams Co. v. City of Los Angeles*, 844 P.2d 534, 539 (Cal. 1993).

²⁰⁰ 631 A.2d 77 (Md. 1993).

²⁰¹ *Id.* at 78-80 (describing the ordinances of Bowie and Takoma Park, Maryland).

²⁰² *Id.* at 88-89.

²⁰³ *Id.* at 86.

²⁰⁴ Indeed, a majority of the court of appeals said as much in noting that because the trial court had found that all of the cigarette vending machines owned by the plaintiffs within Bowie and Takoma Park were “generally accessible to minors,” the ordinances “would be tantamount to a ban on cigarette vending machines in locations in which the State has granted the vendors a license to operate those vending machines.” *Id.* at 89.

²⁰⁵ *Cf. Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 894 (1999) (Stevens, J., dissenting) (criticizing an overreliance on implied preemption at the federal level as giving “unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States”); Nelson, *supra* note 8, at 277.

Lochner.²⁰⁶ At the state level, occupation of the field can similarly constrain local authority, particularly when state courts, as they sometimes do, set a low threshold for the amount of state regulation necessary to constitute wholesale “occupation of the field.” A judicial determination of “occupation of the field” thereafter effectively sets a ceiling beyond which no local regulation can go.²⁰⁷

State courts frequently purport to rely on legislative intent when finding occupation of the field.²⁰⁸ Relying on legislative intent to reach any statutory conclusion has long been the subject of much debate, a full discussion of which is beyond the purview of this Article.²⁰⁹ But in the context of occupation of the field, the courts’ purported reliance on legislative intent raises special difficulties. A conclusion of occupation of the field that rests on legislative intent puts the words “we intend to preempt” into the collective mouth of the state legislature when, in the absence of express language concerning preemption, it is distinctly possible that the legislature never specifically thought about how much local law it intended to displace, or even if it did, it may well have been unable to reach agreement on the matter.²¹⁰ As discussed above, legislators sometimes find ambiguity more convenient and palatable than certainty. Resting a finding of occupation of the field on legislative intent may often, therefore, be disingenuous, which is a common critique of courts’ reliance on legislative intent in any circumstance.²¹¹ Further, “occupation of the field” ascribes a legislative intent to displace all *subsequent* local ordinances, despite the fact that the state legislature, at the time of passing the statute(s) that allegedly occupy a certain field, has no idea what those future local ordinances will look like.²¹² Indeed, if courts truly believed in the fiction of legislative intent to occupy a field, they would be willing to offer advisory opinions declaring a field preempted (in those states

²⁰⁶ Hoke, *supra* note 183, at 718 n.147; *see also* Braden, *infra* note 215, at 35 (describing net result of implied preemption decisions as “a judicial exercise of power over economic legislation”).

²⁰⁷ Hoke, *supra* note 183, at 694 (stating that judicial proclamation of “occupation of the field” can create a “regulatory vacuum” in that field).

²⁰⁸ *See supra* note 199.

²⁰⁹ ESKRIDGE, *supra* note 173, at 16-22; *see* Radin, *supra* note 171; Sunstein, *supra* note 171, at 433-34.

²¹⁰ ESKRIDGE, *supra* note 173, at 18-21; *see also* Note, *Pre-Emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 209 (1959) [hereinafter “Stanford Note”] (criticizing intent-based federal implied preemption doctrine for assuming “that the pre-emption question was consciously resolved and that only diligent effort is needed to reveal the intended solution” when, in fact, “Congress, embroiled in controversy over policy issues, rarely anticipates the possible ramifications of its acts upon state law”).

²¹¹ *See* Radin, *supra* note 171, at 870 (resting statutory interpretation on supposed legislative intent is “transparent and absurd fiction”); *id.* at 872 (“A legislative intent, undiscoverable in fact, irrelevant if it were discovered, is . . . a queerly amorphous piece of slag.”).

²¹² *See* ESKRIDGE, *supra* note 173, at 23.

that allow advisory opinions²¹³), after the state's "occupying" legislation has been passed and before any local legislation within the field has been enacted. I know of no court that has issued such an opinion.

Aside from the difficulties of relying on legislative intent, "occupation of the field," much like "prohibit/permit," is a test that can weaken local lawmaking ability in favor of groups – such as the business lobby – that may have superior access to and influence over state legislators. Particularly where the legislative history supporting "occupation of the field" is murky, judicial skepticism toward such an implied preemption claim is well-warranted. It is likely that in many circumstances, the groups arguing "occupation of the field" have a better chance than their opponents of getting the relief they seek from the state legislature in the form of an express preemption provision.

It is tempting to take the Elhauge-Hills logic further and argue that courts should adopt a default rule that the state legislature has not occupied the field unless it has said so explicitly. Indeed, at least one state's supreme court – Alaska's – has embraced such an approach.²¹⁴ While such a "clear-statement" rule would have the usual benefits of any default rule – clarity and simplicity – it would also suffer from the usual drawbacks: sacrificing judicial flexibility in favor of formalism. If all of the other indicia of statutory meaning weigh heavily in favor of a finding of occupation of the field, it makes little sense to require the legislature to recite "magic words" in order to conclude that a particular field has been occupied. Most relevant to a court should be indicia of a legislative desire for statewide uniformity; if this desire is eminently clear from the statute's text, structure, and history, a conclusion of occupation of the field may be appropriate. Because a judicial declaration of "occupation of the field" prohibits any subsequent local regulation within the preempted field unless and until the legislature acts, however, the bar for indicia of a legislative desire for uniformity should be set quite high.

By contrast, a judicial proclamation of preemption due to "conflict" or "substantial interference" applies only to the particular local ordinance presented, and does not preclude further local experimentation in a particular area. Indeed, perhaps unwittingly, courts frequently assess a state's regulatory scheme *in light of* the local ordinance challenged, and vice versa, deciding whether a field has been completely occupied, even though, in theory, "occupation of the field" can be determined without reference to the local

²¹³ See R. Craig Wood & George Lang, *The Justiciability Doctrine and Selected State Education Finance Constitutional Challenges*, 32 J. EDUC. FIN. 1, 5 (2006) ("Whereas federal courts cannot render advisory opinions, courts in several states play an advisory role, allowing the courts to articulate constitutional principles while 'effectively remanding disputes to other branches.'").

²¹⁴ *Municipality of Anchorage v. Repasky*, 34 P.3d 302, 311 (Alaska 2001). Other state courts have, at times, made statements that might seem to indicate that they share Alaska's view, but they have not been consistent. On the other hand, in Hawaii, occupation of the field is not a judicially created doctrine, as it is in most other states, but is rather specifically called for by the state legislature. See HAW. REV. STAT. § 46-1.5(13) (1993).

ordinance.²¹⁵ The courts' tendency to engage in this sort of comparative analysis demonstrates that they often do not believe that discerning a legislative intent to "occupy" a given field is appropriate, and often focus more on the question of substantial interference, which I explain further below.

III. A NEW APPROACH TO IMPLIED PREEMPTION: PRESERVING STATE SUPREMACY WHILE PROTECTING GOOD-FAITH LOCAL POLICY INNOVATION

One state has gone even further than Alaska in embracing a "default-rule" approach to preemption. Illinois's home rule provision allows for preemption only when accomplished through an express act of the legislature,²¹⁶ even if a

²¹⁵ See, e.g., *Plaza Joint Venture v. City of Atlantic City*, 416 A.2d 71, 75 (N.J. Super. Ct. App. Div. 1980) (stating that "legislative intent to preempt a field" occurs "where the local regulation conflicts with the state statutes or stands as an obstacle to state policy expressed in enactments of the Legislature"); *supra* note 209. The Arizona Supreme Court has on occasion, whether self-consciously or not, melded conflict and field preemption into one, stating that in searching for whether the state has completely occupied the field, local ordinances must be "be actually conflicting." *Jett v. City of Tucson*, 882 P.2d 426, 432 (Ariz. 1994). Other state courts have employed similarly jumbled approaches. See *Plaza Joint Venture*, 416 A.2d at 76; cf. George D. Braden, *Umpire to the Federal System*, 10 U. CHI. L. REV. 27, 40 (1942-43) (criticizing Supreme Court federal preemption doctrine for purporting to rely on Congressional intent when "the fact remains that simple statements that the Court follows congressional intent are neither the whole story, nor perhaps the chief element" of preemption cases); Stanford Note, *supra* note 210, at 217-18 (lamenting that the Court purports to be relying on congressional "intent" in preemption cases but in fact usually does not).

²¹⁶ See ILL. CONST. art. VII, § 6(i) ("Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not *specifically* limit the concurrent exercise or specifically declare the State's exercise to be exclusive." (emphasis added)). Professor Baum of the University of Illinois Law School, who served as counsel to the local government committee at Illinois's 1970 constitutional convention, explained in his authoritative article on Illinois's home rule provisions that:

Unless local power is specifically excluded, section 6(i) guarantees home rule units the authority to act concurrently with the state. The purpose and probable effect of these provisions is to eliminate or at least reduce to a bare minimum the circumstances under which local home rule powers are preempted by judicial interpretation of unexpressed legislative intention. . . . Since the state always can vindicate its interests by legislating in the proper form, it seems unwise to sustain state legislation at the expense of home rule ordinances except when a state statute is in the required form

David C. Baum, *A Tentative Survey of Illinois Home Rule (Part II): Legislative Control, Transition Problems, and Intergovernmental Conflict*, 1972 U. ILL. L. REV. 559, 571, 573, cited in *City of Chicago v. Roman*, 705 N.E.2d 81, 90 (Ill. 1998).

Of course, insofar as the Illinois approach depends on the legislature passing a law that is not vetoed by the governor, or that can override a veto (Illinois requires three-fifths vote of the legislators of each house to override a veto, unlike the Federal Constitution which requires two-thirds), the executive branch will also play a prominent role in deciding questions of preemption. See ILL. CONST. art. IV, § 9; MIKVA & LANE, *supra* note 172, at

court believes that the local ordinance conflicts with state law.²¹⁷ The Illinois approach severely reduces the judicial role in deciding questions of preemption. While Illinois courts still play a role in determining whether the legislature has expressly preempted a certain field, and, if so, the extent of such a preemption provision, two issues which can prove quite thorny,²¹⁸ they do not decide whether preemption has occurred absent some express statement by the legislature on the matter. Perhaps because of the ostensible simplicity offered by this approach, and also due to concerns regarding how other state courts have limited local authority through implied preemption, some scholars have called for other states to adopt an Illinois-like “express-only” approach.²¹⁹

While an “express-only” approach to preemption might better protect local policy experimentation than the mishmash of approaches to preemption used in most states, it is also likely to facilitate the use of local authority for parochial and exclusionary ends, which is the undeniable “dark side” of home rule.²²⁰ In this section I will explain why the judiciary is uniquely positioned to limit the degree to which cities use their home rule powers for parochial and exclusionary ends through the doctrine of preemption, while at the same time protecting the value of local policy experimentation. Further, an express-only regime might threaten the minimum degree of policy coherence necessary for a state to function effectively as a political unit. Even though home rule delegates substantial authority to cities, there remains a need for some version of a supremacy principle like that which exists at the federal level: that the prerogatives of the higher level of government (the state) can trump those of the lower (the city) when there is some irreconcilable level of tension between

67; McNollgast, *supra* note 166, at 708. Moreover, the executive branch will likely decide how and when to intervene in – or possibly initiate – litigation concerning preemption; in states in which the attorney general is independently elected, her interests may differ from the governor’s. See Braden, *supra* note 215, at 45-46 (arguing that, at the federal level, courts should pay special heed to the executive branch’s views on preemption that are asserted during litigation process).

²¹⁷ See *Vill. of Bolingbrook v. Citizens Utils. Co. of Ill.*, 632 N.E.2d 1000, 1004 (Ill. 1994); *Mulligan v. Dunne*, 338 N.E.2d 6, 10 (Ill. 1975). It should be noted that Illinois’s express-only rule applies only to home-rule jurisdictions; implied preemption remains a viable doctrine vis-à-vis non-home-rule towns, which are also subject to Dillon’s Rule. See *T & S Signs, Inc. v. Vill. of Wadsworth*, 634 N.E.2d 306, 310 (Ill. 1994). Also, despite its stated fealty to the express-only rule, the Illinois Supreme Court has at times hinted that, should a local government regulate a matter that is of “statewide” concern, implied preemption might apply. See *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 274 (Ill. 1984).

²¹⁸ See *supra* note 8.

²¹⁹ See, e.g., Briffault, *supra* note 3, at 265 (“Instead of attempting to discern an uncertain legislative intent, courts should require legislatures to make preemption express.”).

²²⁰ See *supra* notes 88-89 and accompanying text.

the two.²²¹ Here too, the judiciary possesses unique institutional advantages that justify its retaining a more-than-negligible role in deciding questions of preemption.

A. *The Judiciary's Institutional Advantages in the Context of Preemption*

By recognizing preemption only where the legislature has expressly said so, the “express-only” approach operates as the ultimate default-rule regime. In the absence of the legislative go-ahead, even if a local ordinance presents an obvious conflict with state law, the judiciary remains powerless to intervene because the legislature has failed to recite the magic words necessary to preempt. Like any default rule, “express-only” smacks of formalism and shortchanges the judiciary’s role in interpreting legislation that may have been intentionally ambiguous, designed to give the judiciary the flexibility to respond to unforeseen circumstances.²²² Express-only preemption also aims to deprive judges of discretion and the capability of rendering anything resembling a normative judgment.²²³ In this vein, Professor Elhauge and other proponents of default-rule theory have described the role of a judge as merely that of an “agent” carrying out the legislature’s instructions.²²⁴ As applied to preemption, an “express-only” default rule reduces judges to “agents” merely searching for a specific instruction from the legislature rather than partners in the process of interpreting state laws and developing the vertical distribution of power in a home rule system. Depriving courts of any role in determining the

²²¹ I recognize that the notion of state supremacy is not uncontested as a theoretical matter. The strongest advocates of city power argue that local government should trump state government in certain circumstances, just as the strongest advocates of state power argue for its sometime supremacy over federal law. *See, e.g.*, SCHRAGGER, *supra* note 24, at 167-78 (suggesting a federal constitutional doctrine that protects local governments from contrary state commands, at least in the context of vindicating substantive constitutional rights). Rather than revisit that very interesting debate, this Article simply accepts as a given, consistent with current federal constitutional law, *see* *N. Ins. Co. of N.Y. v. Chatham County, Ga.*, 547 U.S. 189 (2006); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907), as well as the constitution of every state, that the state has the ability to override local governments on most, if not all, matters. (As explained above, in the few states with an imperio home rule regime, city ordinances regarding purely “local” matters are immune from state override. *See supra* note 65. This immunity, per *Hunter*, is based only on the state constitution and not on any federal constitutional protection.)

There is arguably federal constitutional support for the proposition that states not only *can* exercise ultimate sovereignty over the jurisdictions within them, but that they *must*: Article 4, section 3, which requires that no state be formed within an already existing state. U.S. CONST. art. IV, § 3.

²²² *See supra* text accompanying notes 172-173.

²²³ Elhauge, *supra* note 107, at 2198; Sunstein, *supra* note 171, at 438 (“[A]gency theory requires that judges exercise minimal discretion” and that a judge “be largely a functionary performing a mechanical process”).

²²⁴ Elhauge, *supra* note 107, at 2165.

parameters of local authority is a mistake, for the judiciary possesses institutional advantages that can be of great benefit in the context of intrastate preemption.²²⁵

1. Geographic Impartiality

One significant advantage of state courts is their ability to decide questions of local authority in a manner less likely to be colored by geographic partiality than state legislative decisions. If an express act of the legislature is required for preemption, the strong force of legislative inertia rests on the side of no preemption, or local autonomy.²²⁶ While such a “default” situation is often good from the perspective of permitting local policy innovation, it is possible – and sometimes eminently probable – that this inertia will make it easier for legislators to silently countenance local ordinances that are detrimental to the state’s general welfare, particularly parochial or exclusionary ordinances that are politically popular in their districts.

Parochial or exclusionary ordinances protect a particular city at the expense of those outside the community, generating substantial negative externalities, amounting to what Professor Clayton Gillette has referred to as “expropriation.”²²⁷ Unlike “good-faith” ordinances, which I will discuss further below, parochial ordinances impose substantial and tangible social costs on other communities without any sacrifice by the city benefiting from the ordinance. An ordinance banning sex offenders from a city, for instance, is likely to push sex offenders into surrounding towns that lack such ordinances, regardless of the motivations of the city council enacting such a ban.²²⁸ Although the enacting city council might argue that its ordinance is not designed to push sex offenders into other communities, but rather is designed only to protect children, when the imposition of substantial negative externalities is a near certainty, the ordinance expropriates regardless of its drafters’ intent, and is appropriately labeled parochial. Other examples of possible exclusionary local ordinances include bans on power lines or power stations within city limits,²²⁹ and bans on trash landfills within city limits.²³⁰

²²⁵ See generally Sandalow, *supra* note 54.

²²⁶ ESKRIDGE, *supra* note 173, at 251 (“[I]t is much easier to block [legislative] action than it is to obtain such action.”).

²²⁷ Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 628 (1994) [hereinafter Gillette, *Expropriation*] (defining expropriation as legislation that benefits one group at the expense of the rest of society); see also Clayton P. Gillette, *In Partial Praise of Dillon’s Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959, 969 (1991) [hereinafter Gillette, *Dillon’s Rule*].

²²⁸ Gillette, *Expropriation*, *supra* note 227, at 628.

²²⁹ *City of Buford v. Ga. Power Co.*, 581 S.E.2d 16, 17 (Ga. 2003); *Town of E. Greenwich v. O’Neil*, 617 A.2d 104, 106 (R.I. 1992).

As other scholars have, I will assume that it is good to minimize parochial or exclusionary ordinances, even if they are politically popular in the jurisdictions that have passed them.²³¹ When such ordinances stand, the favored group – the city acting parochially – essentially expropriates social benefits from the other communities to whom it has shifted a share of some tangible social problem.

Because state legislators represent individual districts rather than the state as a whole, they can be expected to support local measures adopted by the communities that elect them, even if those measures are parochial and expropriate from other communities around the state.²³² Indeed, a state legislator could be expected to countenance parochial ordinances from his own district that interfere with the very statewide legislation the legislator might otherwise fervently support. Moreover, due to logrolling, a legislator can be expected to influence his colleagues to join him in ignoring parochial ordinances from his district in exchange for doing the same for legislators from other districts.²³³ By such a “gentlemen’s agreement,” the legislature may take no action in the face of a proliferation of parochial local ordinances. Similarly, a particularly powerful state legislator may wield disproportionate clout – due to seniority, prominence in the party’s hierarchy, and/or access to campaign contributions – and use that clout to protect a city in his district from express preemption, even when that ordinance expropriates from other communities around the state.²³⁴ While an implied preemption regime may still allow a powerful legislator to protect his city’s parochial ordinance from preemption by the courts if he can secure an express *exemption* from preemption from the legislature,²³⁵ such an express exemption – as an affirmative act of the legislature – would likely receive significantly more public scrutiny than mere blockage of a bill, which can be accomplished in a number of less transparent ways.

²³⁰ Ala. Disposal Solutions Landfill, L.L.C. v. Lowndesboro, 837 So. 2d 292, 294 (Civ. App. Ala. 2002); N. Country Env’tl. Serv., Inc. v. Town of Bethlehem, 843 A.2d 949, 952 (N.H. 2004); Sawyer Env’tl. Recovery Facilities, Inc. v. Hampden, 760 A.2d 257, 257 (Me. 2000); DeRosso Landfill Co. v. City of Oak Creek, 547 N.W.2d 770, 770 (Wis. 1996).

²³¹ See Hills, *supra* note 29, at 2013 (arguing that cities should not be selfish but should be “more concerned with the region as a whole”); see also Gillette, *Expropriation*, *supra* note 227, at 629.

²³² See Elhauge, *supra* note 74, at 41 (explaining how “territorial representation furthers ‘pork barrel’ politics”).

²³³ See Gillette, *Expropriation*, *supra* note 227, at 637-38.

²³⁴ In some states legislative candidates may funnel money contributed to their campaigns or to their campaign committees to the races of other candidates, which, arguably, has the effect of making certain legislators feel indebted to their financial “sponsors.” See, e.g., Dave Hogan, *A Few Give a Lot in Oregon Races*, OREGONIAN, Oct. 31, 2006, at B1.

²³⁵ It is possible that such an express exemption could violate a state constitutional ban on special legislation. See *infra* notes 243-246 and accompanying text.

In contrast to the legislature, the judiciary is uniquely positioned to enforce a norm of geographic impartiality, under which cities' potentially offensive ordinances are treated with some semblance of equality. The members of the high courts of forty-two states are either appointed by the governor, who is elected statewide, or run for office themselves on a statewide basis. In forty-two states, therefore, high court judges do not purport to represent a particular geographical constituency within the state. The remaining eight states select high court judges from geographical districts.²³⁶ Even in these eight states, however, a justice's allegiance to any particular geographic area is likely muted by the large size of the district as compared to the average state legislative district's size.²³⁷ Moreover, in four of the eight states that use geographic districts, the initial selection of high court justices is made by the governor, and only years after this initial selection by a statewide official do the justices face retention elections by district.²³⁸ In addition, for all state high courts, whether appointed, elected statewide, or elected by district, *stare decisis*, at least in theory, imposes a degree of consistency and uniformity on the courts' decisions in the preemption realm. By contrast, state legislatures

²³⁶ These eight states are: Illinois, *see* ILL. CONST. art. VI, §§2-3 (seven-member high court with three justices selected from one district comprising populous Cook County, and four justices selected from four districts in remainder of state); Kentucky, *see* Kentucky Court of Justice, <http://courts.ky.gov/courts/supreme/> (last visited Nov. 15, 2007) (high court consists of seven justices elected from seven districts); Louisiana, *see* Louisiana Supreme Court, http://www.lasc.org/about_the_court/faq.asp#FAQ04 (last visited Nov. 15, 2007) (seven justices elected from seven districts); Maryland, *see* Court of Appeals, Court Overview, <http://www.courts.state.md.us/coappeals/coaoverview.html> (last visited Nov. 15, 2007) (seven justices from seven districts; initially appointed by governor); Mississippi, *see* MISS. CONST. art. VI, §§ 145, 145-A & 145-B (nine-justice high court with three justices each from three districts); Nebraska, *see* NEB. CONST. arts. V-5, V-21 (seven-member court with all members initially appointed by governor; chief justice subject to statewide retention election and other six justices face retention election in six districts); Oklahoma, *see* The Supreme Court of the State of Oklahoma, The Justices of the Oklahoma Supreme Court, <http://www.oscn.net/oscn/schome/justices.htm> (last visited Nov. 15, 2007) (nine justices from nine districts, initially appointed by governor); South Dakota, *see* South Dakota Unified Judicial System, <http://www.sjudicial.com/index.asp?title=structureindex&category=structure&nav=1> (last visited Nov. 15, 2007) (five justices from five districts; initially appointed by governor).

²³⁷ In Kentucky, for instance, the state is divided into seven districts for the purposes of high court elections, *see* Kentucky Court of Justice, <http://courts.ky.gov/courts/supreme/> (last visited Nov. 15, 2007), whereas the Kentucky Legislature consists of a Senate with 38 members and a House of Representatives with 100 members. *See* Kentucky Legislature, <http://www.lrc.state.ky.us/> (last visited Nov. 15, 2007).

²³⁸ These four states are Maryland, Nebraska, Oklahoma, and South Dakota. *See supra* note 236.

are free to make entirely ad hoc and unprincipled judgments regarding preemption.²³⁹

Moreover, even in those states where judges are elected by district, judges are less likely than state legislators to think of themselves as “representatives.”²⁴⁰ Legislators are expected to “bring home the bacon” to the districts they represent, and are constantly identified by the news media as representatives of a particular city or set of cities. Legislators usually maintain home district offices that cater to services of constituents who live only within their districts.²⁴¹ Judges, by contrast, at least traditionally, perceive themselves as beholden to the law, not any particular geographic constituency. Even in the many states where lower court judges run for office within a particular city or county, those judges, when faced with a preemption question, must abide to some degree by precedents of the state’s highest court or risk being overturned. Further, even assuming that a state high court judge might run for office on a campaign platform including promises to protect the prerogatives of a particularly large or politically influential city within the state, or within his district, questions of state-local power distribution usually play a relatively minor role in judicial campaigns, easily overshadowed by more “hot-button” issues like crime, abortion, and “tort reform.”²⁴²

Viewing the doctrine of implied preemption as resting in part on the judiciary’s relative geographic impartiality vis-à-vis the legislature is consistent with another anti-expropriation device common to most state constitutions: the ban on special legislation.²⁴³ In some states, these provisions prohibit the state legislature from passing “local laws,” or laws that apply only to a particular city or county, at least without that city’s approval or without a compelling reason for special treatment.²⁴⁴ The bans restrain lawmakers from singling out, at the expense of the public good, a particular city for legislative favor or disfavor. As such, they protect cities from being picked on, and prevent the kind of legislative logrolling that may produce numerous special benefits for localities around the state, but at a significant cost to the statewide public good.²⁴⁵ These bans recognize that the judiciary may be uniquely

²³⁹ See Stabile, *supra* note 8, at 87. Again, the ban on special legislation may constrain just how inconsistently the legislature may treat different municipalities. See *infra* notes 243-246 and accompanying text.

²⁴⁰ See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1363 (2006) (“[E]ven where judges are elected, the business of the courts is not normally conducted, as the business of the legislature is, in accordance with an ethos of representation . . .”).

²⁴¹ See Elhauge, *supra* note 74, at 41.

²⁴² See Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411, 1426 (2001).

²⁴³ See BRIFFAULT & REYNOLDS, *supra* note 4, at 244-46.

²⁴⁴ See, e.g., Gillette, *Expropriation*, *supra* note 227, at 642-44.

²⁴⁵ *Id.* at 642-57.

positioned to prevent interlocal expropriation. Implied preemption, by also relying on the judiciary's relative geographic impartiality to minimize interlocal expropriation, is a conceptual sibling of the ban on special legislation.²⁴⁶

The ban on special legislation is one of many provisions common to state constitutions – including public purpose clauses, expenditure and debt limitations, prohibitions on special commissions, expenditure limitations, prohibitions on unfunded mandates, and single-subject requirements – that envision a bold role for state courts in minimizing expropriative action by local governments and other interest groups.²⁴⁷ As Professor Gillette has explained, these state constitutional doctrines contemplate that courts will take a more active role in inquiring into the legislative process than would be appropriate for courts in the federal system, where there are no similar constitutional provisions.²⁴⁸ Therefore, viewing courts as mere “agents” of the legislature, as default-rule theory is wont to do, is particularly inappropriate for state courts, and default-rule theory is even less attractive in the context of intrastate, as opposed to federal, preemption.²⁴⁹

2. Tempered Political Insulation

One of the most familiar arguments for judicial intervention, particularly at the federal level, is that courts, as compared to the legislative and executive branches, are more insulated from political pressures.²⁵⁰ This argument also counsels in favor of rejecting an “express-only” approach to preemption. The political insulation argument works somewhat differently at the state level due to the prevalence of judicial elections; thirty-eight states have some form of an election for the judges of their high court.²⁵¹ In these states, one would expect

²⁴⁶ *But see id.* at 657 (concluding that enforcement of a ban on special legislation is “unlikely to be worth the effort”).

²⁴⁷ *See* Gillette, *supra* note 84, at 11, 34.

²⁴⁸ *Id.* at 35, 39.

²⁴⁹ For a more extensive discussion of the “agency” theory of the judicial role and academic criticisms thereof, albeit mostly in the federal context, see RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 705-08 (5th ed. 2003).

²⁵⁰ *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 375 (1986); LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES 74 (2004).

²⁵¹ Some states, such as New York, elect lower-court judges but not the justices of the high court. ABA Fact Sheet on Judicial Selection Methods in the States, http://www.abanet.org/leadership/fact_sheet.pdf (last visited Oct. 8, 2007) [hereinafter ABA Fact Sheet] (describing whether judges are elected or appointed for each state); *see also* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725-26 (1995) (discussing how judges are appointed or elected by each state). Although these lower court judges may be as susceptible to political pressures as any other elected official, they are nonetheless compelled to apply the precedent of the state's less politically pressured high court.

judges not to be as “insulated” from the political winds as their federal counterparts who enjoy life tenure.²⁵² While judges in the thirty-eight states with judicial elections may be less politically insulated than their federal counterparts, they are nonetheless still likely to be subject to less political influence than legislators. In sixteen of the thirty-eight states, high court judges face only uncontested retention elections after their initial appointments.²⁵³ In fourteen of the thirty-eight states with judicial elections, the races are officially nonpartisan,²⁵⁴ although it is unclear how much this factor alone reduces the influence of politics on the judiciary.²⁵⁵ More significantly, in most of the thirty-eight states that have judicial elections, judges are elected or re-elected to terms substantially longer than those of the average legislator, ranging from six to fifteen years.²⁵⁶ The relative infrequency with which state high court judges face voters is likely to increase their political insulation.²⁵⁷ Finally, as explained above, insofar as preemption raises issues of geographical favoritism, judges are likely to feel less pressure in this regard than state legislators.²⁵⁸

To the extent that the prevalence of judicial elections weakens the political insulation argument, it helps blunt the charge of “illegitimacy” frequently leveled at courts that take an active role in deciding questions of law and social policy. This charge rests largely on the perceived lack of democratic accountability of unelected judges, which is why it is most commonly directed

²⁵² In the twelve states without judicial elections for the high court, judges are perhaps as insulated from political pressures as their federal counterparts. Some of these twelve states use some version of non-elective reappointment, while others employ lifetime terms or mandatory retirement ages. ABA Fact Sheet, *supra* note 251; *see also* Croley, *supra* note 251, at 725-26.

²⁵³ *See* ABA Fact Sheet, *supra* note 251; *see also* Croley, *supra* note 251, at 725-26.

²⁵⁴ ABA Fact Sheet, *supra* note 251.

²⁵⁵ Some contend that nonpartisan judicial elections reduce the influence of political parties and organized interest groups, *see* NATIONAL CENTER FOR STATE COURTS, CALL TO ACTION: STATEMENT OF THE NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION 14 (2002), *available at* <http://www.judicialcampaignconduct.org/CallToActionCommentary.pdf> [hereinafter, CALL TO ACTION], while others disagree, contending that such elections are nonpartisan in name only; *see* Ryan L. Souders, Note, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529, 565-67 (2006) (arguing that removing a party name from the ballot does not reduce a judicial candidate’s political affiliations).

²⁵⁶ *See* CALL TO ACTION, *supra* note 255, at 17.

²⁵⁷ *Cf.* Jed Handelsman Shugerman, Fear, Filters, and Fidelity: Judicial Elections and the Making of American Tort Law 5 (June 28, 2007) (unpublished manuscript) (arguing that, historically, longer terms better insulated high court judges from party politics and special-interest influence than shorter terms), *available at* http://www.law.stanford.edu/display/images/dynamic/events_media/Shugerman_Fear_Filters_Fidelity.pdf.

²⁵⁸ *See supra* notes 226-246 and accompanying text.

at the federal judiciary.²⁵⁹ The perceived lack of democratic legitimacy of the judiciary is at the root of the default-rule theory of statutory interpretation; if it is only the legislature that is democratically accountable, then judges *should* serve as mere “agents” of it.²⁶⁰ Whatever merit the legitimacy attack on judicial intervention may have at the federal level, where members of the judiciary are unelected and enjoy lifetime appointments, the fact that many states elect their judges makes them more democratically accountable, and, hence, renders their exercise of discretion more “legitimate.”²⁶¹

State courts’ relative insulation from politics renders them more willing to hold certain ordinances preempted than the legislature would be in an expressly-only regime. When a local ordinance substantially disrupts an unpopular statewide legislative project or constitutional responsibility, such as trash disposal or the release of sex offenders from the state prison system, legislators may be unwilling to expressly preempt the ordinance despite the problems it poses for the state as a whole. Legislators may be afraid that their support for preemption is viewed as support for the particular unpopular activity targeted by a local ordinance – such as sex offenders’ rights – rather than as protecting other cities in the state from another city’s parochial local action.²⁶² As the more politically insulated branch, the judiciary may be less concerned about such risks and more willing to protect uniformity in the enforcement of state law.

3. Speed

Another significant institutional advantage that state courts possess vis-à-vis their legislative counterparts is speed. Although the judicial branch has long been known for its deliberativeness and delay,²⁶³ it is in some ways able to act more quickly than the legislature in addressing questions of preemption. While even the most rushed legislation will usually take a number of days – and most often weeks – to achieve passage, courts can issue temporary

²⁵⁹ See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (2d ed. 1986).

²⁶⁰ Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2040-44 (2002) (suggesting that statutory interpretation should reflect political preferences and not the personal view of individual judges, so courts should interpret statutes “that on average minimize political dissatisfaction”).

²⁶¹ See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 71 n.26 (1991) (“Since state judges are often elected . . . [state judicial] activism may be less objectionable.”); MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* 168 n.17 (1982) (“[P]olicy-making by state courts does not invariably give rise to the problem of legitimacy . . . because state judges, unlike federal judges, are often electorally accountable.”).

²⁶² See, e.g., *City of Northglenn v. Ibarra*, 62 P.3d 151, 151 (Colo. 2003).

²⁶³ See CHARLES DICKENS, *BLEAK HOUSE* 1-5 (Gordon N. Ray ed., 1956) (1853); WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 1 (lamenting “the law’s delay”).

restraining orders and/or preliminary injunctions within minutes after a case is filed. This concern about delay is particularly acute in the approximately forty states that have only part-time legislatures,²⁶⁴ including the six states whose legislatures meet biennially.²⁶⁵ Indeed, even the primary architect of Illinois's "express-only" preemption provision, Professor David Baum, conceded that Illinois's seemingly absolutist view of express preemption might have to yield "in those few cases where vital state interests would be sacrificed by permitting the local legislation to prevail until" the next legislative session,²⁶⁶ recognizing that a reliance on the legislature alone for preemption purposes would sacrifice the ability of the courts to respond quickly.

Of course, for the judiciary to move faster than the state legislature in preempting a particular ordinance, a lawsuit must be brought to challenge the ordinance. Courts act at the behest of litigants and do not act *sua sponte* like legislatures. Thus, an affected interest group or, possibly, the state, must have sufficient interest and resources to sue.²⁶⁷ The fact that judicial review depends upon the bringing of a lawsuit might skew implied preemption in favor of interest groups – businesses and otherwise – with easier access to the courts. Nonetheless, the option of judicial action is theoretically available for all in a state that retains some version of implied preemption, whereas in an express-only regime, the judiciary is prevented from taking any action in the absence of an express statement from the legislature, despite whatever havoc a local ordinance might immediately wreak.

Despite these numerous institutional advantages of the judiciary, those in favor of an express-only regime might argue that implied preemption is fundamentally a policy determination, and policy, as opposed to legal determinations – to the extent a distinction can be drawn – are best decided by the legislature. It is often thought that policy decisions better emanate from the legislature than the judiciary due to the latter's institutional limitations. Legislation is designed to be prospective whereas the courts' traditional role is to look backwards at the facts underlying a dispute between identifiable

²⁶⁴ As the National Conference of State Legislatures has noted, the distinction between "full-" and "part-time" state legislatures is difficult to draw. National Conference of State Legislatures, *NCSL Backgrounder: Full- and Part-Time Legislatures*, http://www.ncsl.org/programs/press/2004/backgrounder_fullandpart.htm (last visited Oct. 8, 2007) (explaining that with 50 different legislatures it is difficult to simply classify them in either "full" or "part-time" categories). The Conference classifies up to forty state legislatures as bodies in which the members do not make sufficient income to give up other employment, with eighteen of these legislatures being especially low-paid. *See generally id.*

²⁶⁵ These states are Arkansas, Montana, Nevada, North Dakota, Oregon, and Texas. *See* James Sinks, *Oregon: Legislature to Give Annual Sessions a Try*, BAKER CITY HERALD, Jan. 5, 2007, available at http://www.bakercityherald.com/news/results.cfm?story_no=4452.

²⁶⁶ Baum, *supra* note 216, at 573.

²⁶⁷ As Clayton Gillette has explained, the "[j]udicial process is not self-executing; [it] occurs only when a local act is challenged." Gillette, *Dillon's Rule*, *supra* note 227, at 992.

parties.²⁶⁸ The legislative effort can rely on professional staff and numerous experts, with none of the formal constraints imposed by the rules of evidence and other courtroom rules.²⁶⁹ The legislative effort is supposed to allow for significant public input, whereas litigation is generally driven by the parties to the lawsuit.²⁷⁰ For all of these reasons, complex, forward-looking policies are generally considered a subject better suited to legislatures.

Insofar as implied preemption involves weighing competing policy considerations, however, such a task is not new to the judiciary, for interpreting and developing the common law – a task laden with policy implications – is at the core of state courts’ historical role. Moreover, policy determinations are an essential part of the constitutional and statutory interpretation in which state courts engage every day.²⁷¹ By virtue of their experience with conflicts of laws, state courts are also particularly well-equipped to weigh competing legislative policies like those presented by allegedly conflicting state and local laws.²⁷² The mere fact that implied preemption requires the judiciary to weigh competing policy concerns, therefore, is no reason to reduce the judiciary to a menial, “agent”-like role in deciding preemption questions. A role for the judiciary in deciding preemption questions is particularly warranted in the state context due to the active role that state constitutions envision for their courts in supervising legislation and potentially expropriative local action.

B. *Substantial Interference with State Law*

Given their institutional advantages, state courts are uniquely positioned to decide cases of implied preemption in a manner that bolsters local policy experimentation while minimizing parochial behavior by cities.²⁷³ State courts can best accommodate these competing goals by applying a “substantial interference” test to claims of implied preemption.²⁷⁴ In some cases, the local

²⁶⁸ See David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 551-52 (1988).

²⁶⁹ *Id.*

²⁷⁰ *Id.*; see also *supra* note 262 and accompanying text.

²⁷¹ See Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 6 (1995).

²⁷² Cf. Mary J. Davis, *On Preemption, Congressional Intent, and Conflict of Laws*, 66 U. PITT. L. REV. 181, 182 (2004) (“Preemption doctrine, therefore, is a subset of the larger subject of conflict of laws.”).

²⁷³ See Kaye, *supra* note 271, at 6 (observing that state courts deal daily with community concerns and the need to balance the public interest).

²⁷⁴ See Smith, *supra* note 15, at 745. States that claim to use a “substantial interference” test or its equivalent include Maine, Massachusetts, and Oregon. ME. REV. STAT. ANN. tit. 30-A § 3001 (1964) (“The Legislature shall not be held to have implicitly denied any power granted to municipalities . . . unless the municipal ordinance in question would frustrate the purpose of any state law.”); *Take Five Vending, Ltd. v. Provincetown*, 615 N.E.2d 576, 579

ordinance presents direct and obvious interference, and implied preemption is an easy call. To uphold local ordinances in such instances solely because the legislature has not included an express preemption provision would sanction defiance of state law in the name of formalism.²⁷⁵ For instance, in *Casuse v. City of Gallup*,²⁷⁶ the New Mexico Supreme Court addressed a state law that required members of city councils of municipalities with populations of more than 10,000 to be elected from single-member districts.²⁷⁷ The city of Gallup, with a population greater than 10,000, elected its city councilors at-large.²⁷⁸ The court appropriately struck down the ordinance as preempted,²⁷⁹ despite the fact that the relevant state law did not include an express preemption provision, because the ordinance clearly contradicted state law.²⁸⁰ In *AFSCME v. City of Detroit*,²⁸¹ the Michigan Supreme Court addressed a similar conflict. After the Michigan state legislature passed a law severing housing commissions and their employees from the cities in which they operate,²⁸² Detroit passed an ordinance specifically recognizing employees of the Detroit Housing Commission as city employees.²⁸³ Again, despite the absence of an express preemption provision in the relevant state law, the Michigan Supreme Court invalidated Detroit's ordinance as impliedly preempted.²⁸⁴

In other cases, the answer to the question of "substantial interference" is less clear, requiring courts to weigh competing policy objectives. This exercise is familiar to courts that have a tradition of deciding conflicts of laws cases. "Substantial interference" commonly focuses on the broader notion of legislative purpose rather than the more specific question of legislative intent.²⁸⁵ Rather than asking whether the legislature that passed the statute in

(Mass. 1993); *Bloom v. City of Worcester*, 293 N.E.2d 268, 281 n.16 (Mass. 1973); *State v. Tyler*, 7 P.3d 624, 627 (Or. Ct. App. 2000).

²⁷⁵ See *Jefferson v. State*, 527 P.2d 37, 44-46 (Alaska 1974) (Connor, J., concurring) (rejecting an express-only preemption rule as "an illusionary, unworkable solution to a problem which is quite complex and which is, like many things in modern life, not susceptible to decision by mere slogans or mechanical formulae").

²⁷⁶ 746 P.2d 1103 (N.M. 1987).

²⁷⁷ *Id.* at 1104 (citing N.M. STAT. ANN. § 3-12-1.1 (West 1978)).

²⁷⁸ *Id.*

²⁷⁹ See *id.* at 1105.

²⁸⁰ *Id.*

²⁸¹ 662 N.W.2d 695 (Mich. 2003).

²⁸² *Id.* at 698.

²⁸³ *Id.* at 699.

²⁸⁴ *Id.* at 697-98.

²⁸⁵ See ME. REV. STAT. ANN. tit. 30-A § 3001(3) (municipality's power should be restricted only when "the municipal ordinance in question would frustrate the *purpose* of any state law" (emphasis added)); see also REPORT OF THE JOINT STANDING COMMITTEE ON LOCAL AND COUNTY GOVERNMENT ON THE REVISION OF TITLE 30, 112th Leg., at 11 (Me. 1993) (municipality's home rule power should not be restricted unless the municipal legislation "prevents the efficient accomplishment of a defined state *purpose*" (emphasis

question specifically intended to “occupy” a given “field,” an inquiry which is often disconnected from reality, “substantial interference” asks whether the ordinance contravenes the broad purposes of state law.²⁸⁶

Insofar as “substantial interference” gives courts more discretion than a hard-and-fast default rule like “express only,” advocates of local authority might fret that a judicial focus on a manipulable concept like legislative purpose could lead to inconsistent, contradictory rulings that threaten local policy experimentation.²⁸⁷ To guard against this concern, courts applying the substantial interference test should afford a presumption of validity to “good-faith” local policy experiments. Contrariwise, recognizing that expropriative behavior by localities is the undeniable “dark side” of home rule, parochial and exclusionary local ordinances should not benefit from such a presumption. Such a role for state courts is normatively appealing in that it seeks to advance the best of home rule while minimizing its worst. It is also grounded in state constitutional design; as explained above, state constitutional law envisions an active role for the judiciary in minimizing interlocal expropriation. A concern for interlocal expropriation recognizes that every city ordinance is, at least in theory, an exercise of the police power the state has *delegated* to localities; courts can assist the legislature in ensuring that cities do not use this delegated police power in a manner so as to hurt other communities around the state.²⁸⁸

In contrast to a parochial or exclusionary local ordinance, which imposes substantial and tangible costs on to other communities with no corresponding sacrifice by the enacting city, a good-faith policy experiment²⁸⁹ is a city’s reasonable attempt to solve a social problem²⁹⁰ in a way that fairly internalizes

added)); *Bloom v. City of Worcester*, 293 N.E.2d 268, 281 n.16 (Mass. 1973) (noting that the “test” for conflict is “whether the local ordinance . . . frustrates the fulfilment [sic] of the legislative *purpose* of any arguably relevant general law” (emphasis added)); *State v. Tyler*, 7 P.3d 624, 627 (Or. Ct. App. 2000) (“[T]est for whether a state law preempts a local civil or criminal ordinance is whether the local rule is incompatible with the legislative *policy*.” (emphasis added)).

²⁸⁶ See *supra* note 285.

²⁸⁷ See Sunstein, *supra* note 171, at 428 (explaining why “[p]urposive interpretation . . . is far from a panacea”).

²⁸⁸ Cf. *S. Burlington County NAACP v. Twp. of Mt. Laurel*, 336 A.2d 713 (N.J. 1975).

²⁸⁹ See *supra* text accompanying notes 227-230.

²⁹⁰ Social problems include those that the city may be the first to recognize. The newfound recognition of social problems by cities is as valuable to the national political discourse as new policy solutions by cities to long-recognized social problems. As in the case of global warming, cities have, at times, been quicker to recognize problems of national or international magnitude than the federal government. While the effectiveness of a city’s solution to problems of a national or global nature may be limited, the city is still performing a valuable role by informing and possibly influencing the larger political debate. See Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1, 13 n.49 (2006). Thus, it is generally better for courts to refrain from limiting cities’ policymaking authority to “local” problems, which was the primary flaw of the imperio

the costs of the policy experiment, at least vis-à-vis other cities. A good-faith policy experiment need not be airtight in terms of externalities, but a court should be satisfied that there is at least a rough fit between the problem the city addresses and the solution it adopts. On the other hand, when the imposition of substantial negative externalities is a near certainty, the intent of the city is less relevant than the effects of the ordinance, and a court is generally entitled to draw the conclusion that a city has acted parochially.²⁹¹

City ordinances may create intangible problems that did not previously exist for surrounding cities, but I do not include these in the calculus of whether a city has fairly internalized the costs of its policy experiment. As Professor Richard Schragger has explained, any local legislation that regulates conduct somehow implicates moral values, so objections to local authority based upon intangible externalities would swallow up decentralized government.²⁹² On the issue of gay rights, for instance, San Francisco's solution to the "problem" of a lack of domestic partnership benefits for employees of city contractors may in turn create the "problem" of rewarding the "sin" of homosexuality for more conservative communities outside of San Francisco.²⁹³ Similarly, cities that passed higher minimum wage laws or banned smoking may offend the ideological sensibilities of other, more laissez-faire communities, thereby imposing a negative intangible externality upon them. Because of the possibility that the consideration of intangible, ideological externalities might

system that the second-wave home rule reformers sought to remedy. *See supra* notes 54-56 and accompanying text.

²⁹¹ But what if a city has a particularized need to avoid a certain social harm, a need not shared by any other city in the state? Assume, for instance, that a city enacts draconian sex offender housing restrictions because it has the highest percentage of child residents in the state, or that a city bans landfills because it has a particularly delicate environmental ecosystem. Is not each of these cities behaving more like Los Angeles did in restricting the sale of broad-tipped marker pens – that is, seeking a solution more properly tailored to its particularized local needs? *See Sherwin-Williams Co. v. City of Los Angeles*, 844 P.2d 534 (Cal. 1993). There may sometimes be compelling reasons for a city to externalize the costs of a social problem on to other communities better positioned to bear the burdens. Those other communities may be said to have demonstrated their willingness to accept the shifted problems by not passing similarly restrictive ordinances. On the other hand, in certain circumstances, the lack of similarly restrictive ordinances in outside communities may be attributable to a vicious cycle of parochial action by the city now claiming unique needs; i.e., if a relatively rich city practices exclusionary zoning, its relatively poor neighbors may be more willing to tolerate undesirable land uses such as landfills to receive an infusion of cash. *See Cashin, supra* note 88, at 2012-15. Courts assessing an ordinance that purports to be tailored to unique needs should ascertain whether it responds to a genuine local need that is not just the result of prior parochial behavior.

²⁹² Schragger, *supra* note 24, at 161.

²⁹³ *Id.* at 147-50 ("The relationship between national, state, and local power, and the appropriate level of government at which to regulate marriage has become intimately tied up with substantive questions of the morality of homosexuality and the justice of same-sex marriage.").

swallow up decentralized government, such harms should not be part of a court's calculus in applying the doctrine of intrastate preemption, at least in the absence of a positive identification of such externalities by the state legislature.

Many of the most prominent recent city ordinances constitute good-faith policy experiments that attempt to solve a social problem – long-recognized or newly recognized – without imposing substantial costs on neighbors. For instance, San Francisco's decision to require that all city contractors provide domestic partnership benefits to their gay employees is not an effort to shift social problems to another city. If anything, this measure only increases San Francisco's municipal expenditures, insofar as the measure will lead to higher costs for contractors, who will then likely pass some of this cost on to the city, perhaps requiring increased taxes and decreased spending on other programs. Los Angeles's anti-graffiti ordinance, which restricts the availability of aerosol paint and broad-tipped marker pens, is another good-faith policy experiment because it does not seek to shift the problem of graffiti to other cities, and is unlikely to do so; rather, it attempts to reduce graffiti within Los Angeles.²⁹⁴

Local minimum wage increases present a slightly more difficult case. Unlike the above examples, an argument can be made that a higher minimum wage externalizes costs on to surrounding communities. According to free market doctrine, a higher minimum wage may increase unemployment. While the brunt of such an increase in unemployment might be expected to fall on the wage-raising city itself, it may be that some people who live outside the city will lose jobs inside it, thereby impacting outside communities as well. Moreover, if unemployment in the wage-raising city rises, that may strain social services that are funded in part by taxpayers throughout the state. Further, a higher minimum wage in one city may not cause a net loss in employment, but might simply push low-wage jobs and their attendant woes out to surrounding communities with lower wages. All of the above claims regarding the effects of the minimum wage are, of course, the subject of much debate among economists and other academics.²⁹⁵ To the extent that the standard critiques of the minimum wage have any validity, however, they seem to indicate that the bulk of the harm caused by a local minimum wage increase will be borne by the wage-raising city itself in the form of increased unemployment and the loss of local tax revenue. Thus, a city that raises its minimum wage is largely bearing the costs of its own policy experiment, even if there may be some incidental and speculative impact on surrounding communities.²⁹⁶ Thus, a local minimum wage increase can be fairly characterized as a good-faith policy experiment.

²⁹⁴ See *Sherwin-Williams Co. v. City of Los Angeles*, 844 P.2d 534 (Cal. 1993).

²⁹⁵ See, e.g., Gillette, *supra* note 84, at 22 n.78 (comparing the "mixed" evidence regarding the claim that minimum wages increase unemployment).

²⁹⁶ See Brief Amicus Curiae of the New Mexico Municipal League et al. at 29-30, *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149 (N.M. App. 2005) (No. 25,073).

Good-faith policy experiments should be presumed valid in the face of preemption challenges, but in the rare case where they clearly contravene the purposes of state law, they should nonetheless be invalidated. Parochial local ordinances, on the other hand, should receive no presumption of validity, because they do little to further home rule's normative value of policy experimentation. No state can reasonably operate without trash disposal, or with every city excluding sex offenders for whom the state has a legal responsibility to reincorporate into society. Similarly, if every city within a state banned high-voltage power lines, the state would likely be unable to supply sufficient electric power to its residents. Thus, parochial local action cannot serve as a template for action by a large number of other cities or by the state and federal governments. Moreover, as explained above, parochial ordinances generally impose substantial costs on neighboring cities, a harm that state courts, by their constitutional design, are well-equipped to scrutinize. This is not to say that parochial local ordinances are automatically invalid under a claim of preemption. Rather, they simply should not receive a presumption of validity when a claim of preemption is alleged. In the absence of a relevant state statute or constitutional provision, even parochial ordinances should be upheld, at least when attacked as preempted.²⁹⁷

Without saying so explicitly, it appears that some state courts have taken a skeptical view of parochial ordinances challenged as impliedly preempted. In a number of cases involving city restrictions on trash disposal,²⁹⁸ power

Clayton Gillette argues that living wage ordinances are likely to externalize costs onto tourists, insofar as they predominantly affect employers in the hospitality industry, like hotels. Gillette, *supra* note 84, at 59. Even assuming that this is so, the city that passes the living wage ordinance nonetheless risks losing tourist revenue by increasing the costs of visiting it, so in that sense it is internalizing the costs of its policy experiment. Moreover, the distinction between good-faith and parochial local ordinances that I have proposed hinges on the spillover of a city's policies into nearby communities. Tourists may come from more than just surrounding communities; many hail from faraway states and foreign countries. Unlike its federal counterpart, *see, e.g.*, U.S. CONST., art. IV, § 2 (Privileges and Immunities Clause), state constitutional law does not express a concern for the possibility of cities imposing costs on visitors from faraway states and foreign countries, but it does show a distinct concern for interlocal expropriation, *see supra* note 288 and accompanying text.

²⁹⁷ Excessively parochial ordinances may, however, violate the state constitution in some other way, by virtue of their being an instance of the exercise of the state's police power, which is itself subject to constraints. *See S. Burlington County NAACP v. Twp. of Mt. Laurel*, 336 A.2d 713, 723 (N.J. 1975).

²⁹⁸ *Sawyer Env'tl. Recovery Facilities, Inc. v. Town of Hampden*, 760 A.2d 257, 258 (Me. 2000) (holding town ordinance restricting landfill expansion preempted by state law); *N. Country Env'tl. Servs., Inc. v. Town of Bethlehem*, 843 A.2d 949, 950 (N.H. 2004) (holding some of town's zoning ordinances restricting landfills preempted by state law); *DeRosso Landfill Co. v. City of Oak Creek*, 547 N.W.2d 770, 770 (Wis. 1996) (holding city's landfill prohibition preempted by state law).

stations,²⁹⁹ and power lines,³⁰⁰ and in at least one case involving municipal regulation of sex offenders, state courts have afforded little deference to the challenged local ordinance. For instance, in *Alabama Disposal Solutions-Landfill, L.L.C. v. Town of Lowndensboro*,³⁰¹ an Alabama court invalidated as impliedly preempted a town ordinance that amounted to a blanket prohibition on landfills within the city's jurisdiction, which would have prevented a private landfill operator from constructing a regional waste facility that had received county and state approval pursuant to the state's regulatory scheme for solid waste.³⁰² Although on its face the court's opinion relied on the "prohibit/permit" test, the court may have been motivated by concerns regarding the parochial nature of the town's landfill ban.³⁰³ Similarly, in *Rhode Island Cogeneration Associates v. City of East Providence*,³⁰⁴ the court held that East Providence's ban on the industrial use of coal within city limits, designed to exclude a coal-burning power plant, was impliedly preempted by state environmental laws.³⁰⁵ Finally, in *City of Northglenn v. Ibarra*,³⁰⁶ the Colorado Supreme Court struck down a local ordinance that prohibited unrelated or unmarried registered sex offenders from living together in a single-family home because it interfered with the state's ability to place in foster care adjudicated delinquent children who were also registered sex offenders.³⁰⁷ While *Ibarra's* conclusion of implied preemption is questionable in that it is not clear that the state's goals could not have been reasonably accomplished by not pairing sex offenders in any one foster home,³⁰⁸ the court's decision was clearly motivated by concerns that the city of Northglenn was attempting to avoid its fair share of a statewide burden.³⁰⁹

Courts should avoid the temptation to label as parochial any local environmental regulation that imposes a restriction on land use.³¹⁰ In the above examples, cities sought to legislate their way out of the problem of trash disposal or electricity generation by simply avoiding the negative aspects of

²⁹⁹ *City of Buford v. Ga. Power Co.*, 581 S.E.2d 16, 17 (Ga. 2003) (holding city's moratorium on construction of electric power substations preempted by state law).

³⁰⁰ *Town of East Greenwich v. O'Neil*, 617 A.2d 104, 110 (R.I. 1992) (discussing town ordinance imposing a three-year moratorium on the construction of electric transmission lines exceeding 60 kilovolts preempted).

³⁰¹ 837 So. 2d 292 (Ala. Civ. App. 2002).

³⁰² *Id.* at 294.

³⁰³ *Id.* at 302.

³⁰⁴ 728 F. Supp. 828 (D.R.I. 1990).

³⁰⁵ *Id.* at 835.

³⁰⁶ 62 P.3d 151 (Colo. 2003).

³⁰⁷ *Id.* at 153.

³⁰⁸ *Id.* at 163-67 (Coats, J., dissenting).

³⁰⁹ *Id.* at 161-62.

³¹⁰ Some commentators have criticized state courts for being too quick to strike down as preempted local environmental laws. See Weiland, *supra* note 14, at 270.

each problem, without reducing the city's contribution to the problem. Were a city ban on trash facilities accompanied by significant efforts to reduce municipal trash production, such as by increasing compost and recycling facilities, the measure would more likely constitute a good-faith policy experiment. In other instances, such as the regulations imposed upon large livestock facilities in *Goodell*, discussed in Part II, the local action is not parochial because it is not necessarily probable that the local ordinances would push hog farming into other communities; rather, Humboldt County, Iowa simply sought to make its county more livable by better controlling the hog farming therein. If every city in the state adopted the additional regulations imposed by the county in *Goodell*, Iowa could remain a hog farming state, albeit a more stringently regulated one.

In a case conceptually similar to *Goodell*, the Idaho Supreme Court in *Envirosafe Services of Idaho, Inc. v. County of Owyhee*³¹¹ invalidated a county's more stringent regulation of hazardous waste facilities as impliedly preempted. Like the livestock-facility regulations in *Goodell*, the county regulations in *Owyhee*, which included increased reporting requirements and a modest fee raise, were unlikely to shift hazardous waste disposal to other communities around the state.³¹² Rather, they sought to improve the safety of the hazardous waste facilities within Owyhee County, and could, therefore, reasonably serve as a template for other Idaho counties with hazardous waste facilities. Accordingly, the ordinance in *Owyhee*, like that in *Goodell*, should have been afforded a presumption of validity when challenged as impliedly preempted. In invalidating the challenged county ordinances, neither the *Goodell* nor *Owyhee* courts took such an approach, perhaps because they incorrectly viewed the counties' environmental ordinances as parochial local policies.

CONCLUSION

A reader might note that there is an intrinsic irony to this paper. As it lauds the pluralism of policies adopted by cities, this Article simultaneously appears to urge a uniform approach to preemption across the home-rule states. I caution, therefore, that the approach to implied preemption articulated here is suggested only as a model that might foster more local policy innovation. It is proposed with an awareness that certain state courts may be unable to adopt such a model because of organic differences in their state constitutions or home-rule statutes. Moreover, some degree of experimentation among states themselves with respect to preemption can inform other states and even the federal courts. Nonetheless, this Article has attempted to demonstrate that implied preemption need not serve as a "dark shadow" hovering over cities as they attempt to find new ways to respond to social problems. Rather, a modest judicial approach to implied preemption can facilitate the kinds of good-faith

³¹¹ 735 P.2d 998 (Idaho 1987).

³¹² *Id.* at 999.

policy experiments that improve the quality of life for city residents while protecting cities from expropriation by their neighbors in a way that exclusive reliance on express, legislative preemption cannot. Such an approach also allows cities to influence policy debates at the state and national levels through their identification of new problems and solutions thereto, with less fear that their policies will be struck down as impliedly preempted.